IN THE SUPREME COURT OF GEORGIA

GEORGIA FIRST AMENDMENT FOUNDATION, Petitioner, v. REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Plaintiff-Respondents, and FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Defendant-Respondents.	Court of Appeals Case No. A23D0265 Supreme Court Case No. _____

THE GEORGIA FIRST AMENDMENT FOUNDATION'S PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The decision below holds that when medical cannabis companies litigate their licensure rights in the State of Georgia, all judicial records relating to that dispute—without limitation or distinction—must be sealed, forever. Worse, the decision below holds that the only parties who have standing to bring a legal challenge against a blanket seal are the parties involved in the dispute, regardless of whether the potential challenger has suffered a concrete, special injury. This bizarre holding is wildly out of alignment with this Honorable Court's established precedent, which expressly provides that in Georgia, as it is throughout these United States, "every citizen has a right to inspect judicial records." *Undisclosed LLC v. State,* 302 Ga. 418, 423 (2017) (emphasis added).

If the decision below stands, the hearing officers of a certain administrative court will be permitted to hear testimony, receive legal arguments, and issue opinions affecting the rights and health care of thousands of Georgians—all from behind a shield of unqualified, perpetual, inviolable secrecy, unlike that of any other tribunal in Georgia. No precedent advocates for this extreme departure from our established principles of open and accessible judicial proceedings.

The threat posed by the recent removal of this public right is not hypothetical. Georgia's new licensing process for medical cannabis distribution has been fiercely protested by profound claims of corruption as to the process and

procedure, and other serious allegations as to the fitness, capabilities, and qualifications of the winning bidders to produce this health-care product.[1] The harm that the public will suffer from the continued practice of secret litigation will undoubtably be exponential.

While opposing parties would argue that the efficiency concerns of administrative proceedings forgive transparency violations, the reality is that these informal proceedings impact the availability and quality of health-care products for thousands of Georgians. As it stands today, these are secret government decisions, made upon secret legal arguments and secret evidence. If this holding is permitted to stand, Georgia jurists will be constrained to hear appeals relating to the regulation and production of a controlled substance from within a newly created star chamber. No member of the public will have the ability to access the records created during this judicial process. This case involves not only the welfare of the general public, but also the welfare of our democracy. The holding below must be reversed.

[1] For example, a pending lawsuit in Fulton County Superior Court (*Pure Peach Organic Inc., et al. v. Ga. Dep't of Administrative Services and Ga. Access to Medical Cannabis Commission*, Case No: 2023CV376367), brought by participants in the licensing process, alleges that the Commission violated numerous standard evaluation and scoring methodologies during the evaluation process, that Commission members had significant conflicts of interest in the licensing process, and that the judicial review process that followed the licensing process severely limited the participant's due process rights. *See* Tab 12 at ¶¶ 34, 35, 40, and 41.

II. STATEMENT OF FACTS

a. Relevant Background

Four years ago, the Georgia Legislature decided that its constituency would benefit from access to medical cannabis. It passed the Hope Act of 2019, O.C.G.A. § 16-12-9, which created the Georgia Medical Access to Cannabis Commission ("Commission") and provided for the licensure of private businesses to produce and distribute the product. Companies quickly queued up to apply for licenses, which is not surprising considering the global cannabis industry surpassed $25.7 billion in 2021 and is expected to reach $148.9 billion within the next ten years.[2] After the Commission rendered its initial licensing decisions, several bidders appealed through a post-award protest procedure developed by the Commission. The outcome was intensely contested by the businesses that lost the opportunity to pioneer medical cannabis production in a newly opened territory, where competition is nonexistent.

b. Procedural Posture

After the licensing process was complete and the decisions were rendered, certain companies decided to contest the outcome of the licensing process by initiating quasi-judicial review. The Commission appointed a hearing officer from

[2] Globe Newswire, *Global Cannabis Market to Reach $148.9 Billion by 2031: Allied Market Research*, Sept. 7, 2022, available at: https://www.globenewswire.com/news-release/2022/09/07/2511824/0/en/Global-Cannabis-Market-to-Reach-148-9-Billion-by-2031-Allied-Market-Research.html (last accessed Apr. 27, 2023).

the Office of State Administrative Hearings ("the Administrative Court") to hear the appeals in the same manner as any other administrative appeal. On June 6, 2022, as these cases were pending under Case No. 2226123-OSAH-GMCC-PL-60-Howells, certain medical cannabis companies filed a motion to seal the hearing record. Tab 5. The understanding of the Georgia First Amendment Foundation ("the Foundation" or "GFAF") was that a hearing on this motion would occur on July 12, 2022. On July 8, 2022, the Foundation sought leave to file an attached amicus brief supporting the opponents to the sealing request.

No ruling was ever issued from the Administrative Court as to the Foundation's Motion for Leave to File Amicus. In the meantime, the Foundation learned that on June 23, 2022, without holding a public hearing, the Administrative Court sealed not only the protests hearing record, but all of the administrative hearings in their entirety. Tab 3. Ironically, the pleadings and orders that would have informed the Foundation of this fact were filed under seal. After learning that the Administrative Court had placed a permanent, blanket ban on the disclosure of all judicial records relating to these matters, the Foundation on September 28, 2022, filed a Motion to Unseal in the nature of an appeal in the Superior Court of Fulton County. Tab 4. For standing, the Foundation relied upon its legal status as an aggrieved party under the Georgia Administrative Procedure Act and upon the common law of this state, which provides standing for the enforcement of a public

right. The Foundation's motion argued that confidential information could be redacted from the judicial records, such that routine scheduling orders, entries of appearance, legal arguments, motions and responses, rulings on preliminary matters, and other non-confidential records could be made available to the public without offending the relevant confidentiality clause within the Hope Act.

Four Licensee Respondents responded to the action, and briefs were filed. On January 6, 2023, the Superior Court heard oral argument on the issue of whether the records should remain sealed. Tab 7. On February 9, 2023, the Superior Court issued a Final Order, denying the Foundation's motion and affirming the blanket seal. Tab 8. On March 1, 2023, the Foundation filed a Motion to Amend the Judgment in the Superior Court, requesting that the Superior Court address issues that were briefed and argued by the Foundation.

On March 10, 2023, the Foundation filed an Application for Discretionary Appeal in the Court of Appeals of Georgia. Tab 9. On March 21, 2023, several cannabis companies filed a response in opposition. On April 10, 2023, the Court of Appeals denied the Foundation's discretionary appeal. Tab 11. On April 13, 2023, the Foundation filed its Notice of Intent to Apply for Certiorari to the Supreme Court of Georgia. Tab 13.

III. JURISDICTION

The Supreme Court of Georgia has jurisdiction to hear this petition pursuant to Article VI, Section VI, Paragraph V of the Georgia Constitution, O.C.G.A. § 5-6-15, and Supreme Court of Georgia Rules 38-45.

The Foundation raised constitutional arguments relating to the public's right to access judicial records (Tab 4, p. 8-10), and these constitutional concerns were addressed in the trial court's opinion. Tab 8, p. 2. These issues were also briefed by the Foundation in its Application for Discretionary Appeal to the Court of Appeals. Tab 9, p. 12-18. Because it is already well-settled law that judicial records are presumptively available to the public, these matters would be within this Honorable Court's exclusive jurisdiction. *Williams v. State,* 273 Ga. 848, 849 (2001) (providing that the Court of Appeals has jurisdiction over appeals involving constitutional issues when the issue in question has already been decided by the Supreme Court); *see also R. W. Page Corp. v. Lumpkin,* 249 Ga. 576, 578 (1982). At the Court of Appeals, the respondents acknowledged that these constitutional issues lie within this Honorable Court's jurisdiction. *See* Tab 10, p. 8-9.

IV. REASONS FOR GRANTING WRIT

First, the Superior Court acknowledged the Foundation's argument "that the order violates the public's constitutional right of access," but nevertheless denied the appeal based on an interpretation of procedural rules that conflicts with this Court's precedent as to the accessibility of judicial records.

The Superior Court concluded that the records were not "court" records, and as such, that the common law right of access to judicial proceedings has no bearing in this case. This holding ignores the fact that the proceedings were judicial in nature, and included the same types of records that are created in any other court (entries of appearance, rulings, motions, responses, briefs, testimony, etc.).

Next, the Superior Court held that Georgia's Administrative Rules of Procedure did not apply to the administrative proceedings, despite the fact that the Administrative Law Judge repeatedly cited these Rules in her pre-hearing orders and ordered parties to submit motions pursuant to them. This is critical, because the Administrative Rules of Procedure provide the same presumption of access that other court rules provide in regard to judicial records. Nevertheless, the Superior Court held that even if the Administrative Rules of Procedure did apply, those rules do not require public disclosure. This holding takes the presumption that judicial records are available to the public and flips it on its head. The proper question under any set of Georgia procedural rules is not whether the procedural rules

require public disclosure. The proper question is whether an applicable confidentiality law requires sealing.[3]

The Superior Court further held that the Foundation could not invoke the unsealing provisions in the Commission's own procedural rules—which also support the presumption of accessibility of judicial records—because those rules were not binding on the public or the media, but rather were only binding upon the applicants to the licenses. The Superior Court, in so holding, ignored the fact that the Administrative Court blatantly refused to follow the Commission procedures, which resulted in the issuance of the seal.

Finally, the Superior Court erred by holding that "[b]ecause GFAF is not a party to these confidential proceedings and no law or rule requires disclosure to non-parties, GFAF's Motion to Unseal is hereby DENIED." As to standing, the Foundation relied upon the Administrative Procedure Act for standing to bring the administrative appeal. No respondent challenged the Foundation's standing under that Act in the proceedings before the Superior Court. As such, the Superior Court's holding that the Foundation could not pursue access to these judicial records because it was not a party to the original proceeding was erroneous.

[3] *See* Ga. Comp. R. & Regs. 606-1-2-.23 (echoing the common law presumption that the administrative hearing record "shall be available to the public," which can only be overcome where there is a specific law that requires confidentiality).

Additionally, this holding cannot be reconciled with this Court's precedent, which holds unequivocally that all citizens have the right to access judicial records.

While the arguments here are largely procedural, the impact of this case substantially affects the public's right to know about the workings of its judicial process. The holding below creates binding precedent on all judicial matters relating to medical cannabis disputes—standing for the extreme and unusual proposition that all judicial records must be sealed for perpetuity in these types of matters. And worse, the case below stands for the proposition that only the medical cannabis companies have standing to challenge a blanket seal of judicial records relating to their dispute. This holding must be reversed.

V. ARGUMENT AND CITATION FOR AUTHORITY

a. The lower court erred by departing from this Honorable Court's precedent as to citizens' right to access judicial records

The lower court concluded that the records involved in this dispute were not "court" records, and as such, that the common law right of access to judicial proceedings has no bearing in this case. Tab 8, p. 2-3. This holding ignores the fact that the proceedings were judicial in nature and included the same types of records that are created in any other court (entries of appearance, rulings, motions, responses, briefs, testimony, etc.). *See Laskar v. Bd. of Regents of Univ. Sys. of Georgia*, 320 Ga. App. 414, 416–17 (2013) (explaining that an administrative hearing is "judicial" in nature when (1) parties are granted notice and the

opportunity to be heard, (2) the hearing officer is required to examine and weigh evidence and to make a decision according to the law, (3) the hearing officer is required to exercise discretion and judgment in application of the law to a particular set of facts, (4) two or more litigants are involved, and (5) the conclusion of the hearing officer is binding).

Moreover, throughout the Administrative Rules of Procedure, the Office of State Administrative Hearings refers to itself as a "Court." *See* Ga. Comp. R. & Regs. 616-1-2-.02 (1) (explaining that the administrative rules of procedure govern all actions and proceedings "before the Court."); *see also* Ga. Comp. R. & Regs. 616-1-2-.02 (1) (defining "Administrative Court" or "Court" as "a Judge of the Office of State Administrative Hearings."); O.G.C.A. § 50-13-13(a)(7) (providing that failure to comply with a subpoena issued by the administrative law judge shall be cause for punishment as for contempt of court); O.G.C.A. § 50-13-13(b) (providing that the ALJ "shall have the same rights and powers given the court under Chapter 11 of Title 9, the 'Georgia Civil Practice Act'"); *Georgia Dep't of Hum. Servs. v. Steiner,* 303 Ga. 890, 890 (2018) (holding that "the superior court erred in reversing the administrative law court.").

The Superior Court's rationale for holding that the records are not "court records" was to reach the conclusion that Uniform Superior Court Rule 21 does not control this dispute, and that therefore the interpretive case law surrounding Rule

21 does not apply. We agree that Uniform Superior Court Rule 21 does not control this dispute. However, we disagree that this Honorable Court's past guidance in Rule 21 case law is not controlling, because this Court has made it abundantly clear that Rule 21 is merely a codification of a pre-existing common law right to access judicial records. As such, the cases interpreting Rule 21 are instructive and applicable as to the constitutional nature of the right to access judicial records, regardless of whether we are in a forum where Rule 21 governs the dispute. *See Undisclosed LLC v. State,* 302 Ga. 418, 421 (2017) ("There is no indication that Rule 21 changed the common law in any way at issue here."); *see also Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy …judicial records and documents." (footnotes omitted)); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc*., 263 F.3d 1304, 1311 (11th Cir. 2001) ("Beyond establishing a general presumption that criminal and civil actions should be conducted publicly, the common-law right of access includes the right to inspect and copy public records and documents."); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) ("We begin by acknowledging the axiom that a common law right exists to inspect and copy judicial records."); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("The right to inspect and copy, sometimes termed the right to access, antedates the Constitution.").

By wrongfully holding that the records were not "court records," the lower court reached the improper conclusion that there is no vehicle for standing, simply because the bid protest procedures do not utilize the same language as Rule 21. The Hope Act, and any procedural rule providing access to judicial records, must be read in a way that complies with this Honorable Court's precedent as to the public's ability to challenge seals of judicial records, because the right emanates from the Constitution. *See* GA. CONST. Art. 1, Sec. 2, Para. I (1983) ("[p]ublic officers are the trustees and servants of the people and are at all times amenable to them."); *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982) (explaining that a transparent judicial process is "one of the principal cornerstones of a free society."); *Bd. of Pub. Educ. for City of Savannah v. Hair,* 276 Ga. 575, 575 (2003) ("When a statute can be read in both a constitutional and unconstitutional manner, the courts apply the construction that upholds the law's constitutionality.").

The lower court's failure to interpret the applicable rules in this larger constitutional context was reversible error. *See Gray v. State,* 310 Ga. 259, 265 (2020) (holding that when interpreting statutes and rules, the court must assume "that the legislature knew about the common-law rule, wanted to keep the rule, and understood that it would be unnecessary to write the rule into the statute when courts have incorporated the common-law rule into the statute for decades."); *see also Merch. L. Firm, P.C. v. Emerson*, 301 Ga. 609, 611 (2017) (reconsideration

denied) ("The right of access to court records under court rule is coextensive with the common law right of access to court proceedings.").

Additionally, community stakeholders (voters, citizens, and taxpayers) have standing to enforce public rights and duties, because community stakeholders are injured when their government does not follow the law. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 315 Ga. 39, 59-60 (2022). A plaintiff's membership in the community provides the necessary standing to bring a cause of action to ensure a local government follows the law, as "public responsibility demands public scrutiny." *Id*. at 184–85 (internal citations and quotations omitted).

The Foundation's members are community stakeholders. *See* Tab 4 at ¶¶ 11-15. In addition to being voters, citizens, and taxpayers, they also include journalists and engaged community members who seek to inform other Georgians about the workings of their government and attorneys who seek to promote the integrity of the litigation process.

b. The lower court erred in its interpretation of the Hope Act because the plain language of the Act is silent as to sealing judicial records

The Hope Act, which governs the actions of the Commission and the licensing process, provides in pertinent part:

> All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities

> conducted pursuant to this part, other than information published in an official commission report regarding the activities conducted pursuant to this article, shall be confidential data and shall not be subject to [the Open Records Act]; provided, however, that any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to this article shall be subject to [the Open Records Act].

O.C.G.A. § 16-12-220(a). There is nothing in the plain language of this passage that mandates a seal of judicial records. In cases relating to sealing judicial records, this Honorable Court has never held that a document's pre-determined "confidentiality" is an automatic bar when those same records later become part of a judicial proceeding and judicial records; rather, the fact that information is confidential is a factor to be weighed against the public's interest in disclosure. *Savannah Coll. of Art & Design v. Sch. of Visual Arts, Inc*., 270 Ga. 791, 793 (1999) (explaining that the confidentiality of a document was a factor that the trial court should have weighed in the balancing test process when determining whether to seal the judicial record).

The standard of withholding agency records from the public under the Open Records Act and the standard of withholding judicial records from the public are completely different, and they have two different mechanisms of access. *See Green v. Drinnon, Inc*., 262 Ga. 264, 264 (1992) (explaining that procedural rules govern public access to judicial records, and simultaneously declining to address whether a judicial record was available under the Open Records Act); *see also In re Atlanta*

J.-Const., 271 Ga. 436, 438 (1999) ("By their nature, civil lawsuits quite often cause litigants to experience an invasion of privacy and resulting embarrassment, yet that fact alone does not permit trial courts to routinely seal court records."). The core of the problem with the lower decisions is that they rest on statutory language that exempts certain information from disclosure under the Open Records Act but does not mention sealing judicial records.

Even if we read an implied sealing mechanism into the Hope Act, the information being sought doesn't fit the definition of what is "confidential" for purposes of that law. *See* O.C.G.A. § 16-12-220(a). There are many items that are in the judicial record that were never "produced by, obtained by, or disclosed to the Commission" pursuant to the licensing process— for example, scheduling orders issued by the Administrative Law Judge, copies of the written protest (these were voluntarily hosted on the Commission's website by the Commission), legal arguments (not factual statements) including citations to case law or statute, entries of appearance, rulings on preliminary matters, motions and responses, *etc*. *See id*. None of these items would be "confidential," as that term is defined in the Hope Act. *See id*.

The Hope Act provides for the confidentiality of information that is obtained by/produced by/disclosed to the Commission "pursuant to the activities conducted pursuant to this part." O.C.G.A. § 16-12-220(a). A reasonable interpretation of

these provisions indicates that the "activities" referenced by the Hope Act are limited to the licensing process. *See id*. Reviewing Part 2 of the Hope Act, which discusses the Role of the Commission, there is no reference whatsoever to litigation following the licensing process or post-award protest procedures. *See* O.C.G.A. § 16-12-210 *et seq.* The parties submitted new arguments raised for the first time in a judicial process that is outside of and in addition to the licensing process contemplated by the Hope Act. None of those new arguments could qualify under the confidentiality protections of the licensing process, except to the extent that they include the severable information that was previously submitted to the Commission as part of the licensing process. *See id*.

The plain language of the Hope Act is not unconstitutional. However, the decisions of both the Administrative Court and the Superior Court raise constitutional concerns because of their incompatibility with existing precedent, which is based on constitutional principles of open government.

c. The lower court erred by finding that the bid protest rules do not provide standing for the public to challenge limited access to judicial records

The Superior Court denied this appeal partly because the bid protest rules do not expressly provide an outlined process for a member of the public to challenge the sealed record. Because of this, the Superior Court found that standing did not exist. Tab 8, p. 3. This interpretation creates an absurd result for several reasons.

First, the bid protest procedures contemplate public access, even if they do not take the extra drafting step of spelling out a precise mechanism for allowing a member of the public to challenge the seal. *See* Tab 7 at p. 70, l. 11 – p. 71, l. 12; p. 73 – p. 74, l.9. The bid protest procedures protect the public's right to access judicial records, namely, *in camera* review and an order that is limited in scope. Tab 1, Section 3.2; Tab 7 at p. 70, l. 11 – p. 71, l. 12; p. 73 – p. 74, l.9.

Given their limited applicability to a very narrow subject matter, the bid protest rules are not nearly as well-developed as other general procedural rules, such as the Uniform Superior Court rules or the Administrative Rules of Procedure. For procedural issues that were not expressly covered by the bid protest rules, the Administrative Court directed litigants to refer to the Administrative Rules of Procedure, which assumes that members of the public may request access to judicial records. *See* Tab 2, Section 5; *see also* Ga. Comp. R. & Regs. 616-1-2-.23.

When construing the bid protest rules, the Superior Court had a duty "to consider the results and consequences of any proposed construction" and not to construe the rule in a way that would "result in unreasonable or absurd consequences." *See Staley v. State,* 284 Ga. 873, 873 (2009) (internal citations and quotations omitted). In cases of statutory or rule construction, the interpretation "must square with common sense and sound reasoning." *Id*.

It is an absurd result for a court to acknowledge (1) that the constitution and common law grant the public a right of access to judicial records, and (2) that the bid protest rules contemplate public access in accordance with that common law right, and (3) despite these findings, to hold that the public has no ability to challenge the Administrative Court's failure to follow the bid protest rules, which, if followed properly, would have granted such access. This is especially true when the "gap-filler" rules, in this case, the Administrative Rules of Procedure, would provide standing for access. *See* Ga. Comp. R. & Regs. 616-1-2-.23.

d. The lower court erred by upholding the Administrative Court's failure to follow the sealing procedures in the Commission's bid protest procedures

The Commission's bid protest procedures provide that the Commission hearing officer may:

> (1) review any confidential Cannabis Commission data in camera *and*
>
> (2) enter a protective order or any other appropriate order necessary to maintain the confidentiality of Cannabis Commission data as required under O.C.G.A. § 16-12-220(a). Tab 1, Section 3.2 (emphasis added).

Although the hearing officer has the discretion to engage in this two-step process or to avoid it, the hearing officer may not *partially* engage in the process, as indicated by the use of the conjunctive "and," which mandates the use of *both* procedural steps. *See id.*, *see also* Tab 7 at p. 74, l. 10-25. The Administrative

Court improperly bifurcated the process when it entered an order sealing the information without first engaging in the prerequisite of *in camera* review. *See id*.

These procedural rules, developed by the Commission itself, tell us much about the Commission's interpretation of the statute that it is charged with enforcing. *See* Tab 1, Section 3.2; Tab 7 at p. 73, l. 19 – p. 74, l. 9. While a reviewing court is not required to defer to the Administrative Court's judicial construction of the Hope Act, it is required to defer to the Commission's ministerial interpretation of the Hope Act, as inferred by the bid protest procedures. *Schrenko v. DeKalb Cnty. Sch. Dist.,* 276 Ga. 786, 790 (2003) ("In construing statutes, courts must consider the General Assembly's intent in enacting the statute, 'keeping in view at all times the old law, the evil, and the remedy;" and "[w]here statutory provisions are ambiguous, courts should give great weight to the interpretation adopted by the administrative agency charged with enforcing the statute.").

First, the bid protest rules demonstrate that the Commission recognizes that not everything that is in the judicial hearing record will be "confidential data" under the Hope Act's confidentiality language found in O.C.G.A. § 16-12-220(a). *See* Tab 1, Section 3.2 (explaining that the protective order must only be entered to the extent that it is "necessary to maintain" the confidentiality of Cannabis Commission data); Tab 7 at p. 73, l. 19 – p. 74, l. 9.

Second, the rules demonstrate that the Commission expected the Administrative Court to review the record *in camera*, which implies that even if a seal or protective order were entered, it would be partial, and would not include the entire record. *See id*. If the Administrative Court had followed the bid protest rules put in place by the Commission, the Foundation would already have the relief it seeks. Tab 7 at p. 74, l. 23-25.

The Administrative Court had a duty to follow the prescribed process of the bid protest rules before sealing the record, which it did not do. As such, the Superior Court erred in upholding the Administrative Court's decision. *See* O.C.G.A. § 50-13-19 (h) (an administrative law judge's decision is reversible error when made upon unlawful procedure or affected by some other error of law). Alternatively, if the Administrative Court felt that the bid protest procedures did not adequately cover the issue of sealing the record, then the "gap-filler" Administrative Rules of Procedure should have been invoked, which would have required the Administrative Court to redact confidential information and to make the remainder of the records public. *See* Ga. Comp. R. & Regs. 616-1-2-.23.

e. The lower court erred in its interpretation of the Administrative Rules of Procedure by holding that they did not apply, and that if they did, there is no presumption of access under those rules, and by failing to properly limit the seal to include only confidential information

The Superior Court held that "Georgia's Administrative Rules of Procedure do not seem to squarely apply to this bid protest…." Tab 8 at p. 3.

The Administrative Rules of Procedure govern all actions and proceedings "before the [Administrative] Court." Ga. Comp. R. & Regs. 616-1-2-.02(1). The Administrative Rules of Procedure define "Court" as "either the Office of State Administrative Hearings, which is part of the executive branch of state government; or a Judge of the Office of State Administrative Hearings." Ga. Comp. R. & Regs. 616-1-2-.01(1).

The matter in question was heard before a Judge of the Office of State Administrative Hearings. Therefore, the Administrative Rules of Procedure applied to the proceedings at issue regardless of the judge's designation as a hearing officer for another administrative agency. *See* Ga. Comp. R. & Regs. 616-1-2-.02 (1); Ga. Comp. R. & Regs. 616-1-2-.01 (1).

Furthermore, the record indicates that the Administrative Court used the Administrative Rules of Procedure throughout the proceedings. The Administrative Court relied upon the Administrative Rules of Procedure as support for issuing the prehearing order and, in other instances, throughout the prehearing order. *See* Tab 2, Section 5. For example, in the Prehearing Order issued on June 12, 2022, the Administrative Court expressly invoked the Administrative Rules of Procedure when instructing the parties how to file their requests to seal the record:

> Request to Seal Record: Any party may request that any portion of the record be sealed, or the court may on its own accord determine that the record, or any portion thereof, shall be sealed. Requests to seal the record should be made by filing a motion pursuant to Ga. Comp. R. & Regs. 616-1-2-.16.

See id. As such, the Superior Court erred by holding that the Administrative Rules of Procedure did not apply to the proceeding before the Administrative Law Judge.

The Superior Court then noted that to the extent that the Administrative Rules of Procedure applied, "those rules do not require public disclosure." Tab 8 at p. 3 (emphasis added). This statement flips the right-to-access presumption on its head. The proper question is not whether the procedural rules require public disclosure. The proper question is whether an applicable confidentiality law requires sealing. *See* Ga. Comp. R. & Regs. 606-1-2-.23 (echoing the common law presumption that the administrative hearing record "shall be available to the public," which can only be overcome where there is a specific law that requires confidentiality).

The Office of State Administrative Hearings, like every other tribunal in Georgia, recognizes the public's right to access judicial records, not only in its procedural rules, but in its case law. In *Ga. Composite Medical Board v. Dodds, M.D.*, a judge of the Office of State Administrative Hearings opined that Georgia's interest in "public trials that are open to the press and public" extends to all

proceedings before administrative law judges. OSAH-CSBME-PHY-1444768-33-Malihi (Apr. 30, 2014). In that opinion, the Administrative Law Judge noted that there was a particularly high public interest in the administrative proceedings before him because it was a medical licensing case, and that all medical licensing cases "are of concern to the public, given the potential for danger to the public of the continued licensure of dangerous practitioners." *Id*. at 3-4. Accordingly, the Administrative Law Judge permitted the media to film and audio record certain portions of the hearing, withholding some portions of the hearing due to the application of a confidentiality law. *See id*. That is the exact procedure that should have been followed at the medical cannabis licensure hearings, where equally serious allegations of potential public harm were being made. But in this case, the Administrative Court sealed the entire record, with no analysis or consideration of the applicable rules and presumptions of openness. Because the administrative rules and the administrative case law create a presumption of openness and a preference for partial seals, the Superior Court erred by holding that the blanket seal was proper under the Rules of Administrative Procedure.

f. The lower court erred by not permitting the Foundation standing to appeal the administrative order under the Administrative Procedure Act

In addition to the standing vehicles previously discussed, the Foundation invoked the Administrative Procedure Act for standing to move to unseal. Tab 4 ¶1, Tab 6, p. 2-5.

The Administrative Procedure Act applies to "agencies," which includes, by definition, state commissions. U.C.G.A. § 50-13-2(1). "Any person" who is "aggrieved by a final decision in a contested case" is entitled to judicial review. Ga. Code Ann. § 50-13-19(a). A "contested case" means "a proceeding…in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." U.C.G.A. § 50-13-2(2). One need not be a party to the original dispute to obtain standing under the APA. *See Georgia Power Co. v. Campaign for a Prosperous Georgia,* 255 Ga. 253, 254–56 (1985); *see also N. Fulton Med. Ctr., Inc. v. Roach*, 263 Ga. 814, 815 (1994) (explaining that a nonparty may be "aggrieved" and maintain standing for purposes of the APA).

The Foundation and its members, who support open and transparent government, have suffered a special injury by the lower court's permanent and blanket denial of access to presumptively public court records. Additionally, the Foundation's board and membership includes journalists who seek to request and report on these specific records to better inform the public about the current legal disputes over which companies will be licensed to manufacture medical cannabis

for citizens of this State. Press freedoms and the free flow of information about these disputes of significant public concern are stymied by the lower court's erroneous refusal to disturb an unconstitutional sealing order. *See Georgia Power Co.,* 255 Ga. at 256. (explaining that a non-party organization was "aggrieved" by an administrative order that would ultimately increase utility rates because the organization's members were Georgia Power ratepayers); *see also Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta,* 281 Ga. 342, 344 (2006) (explaining that standing in an administrative appeal may be established by a showing of interests or rights that will be affected by the action).

VI. CONCLUSION

The public has the right to see these judicial records—this Court's precedent has made that definitively clear. Instead of adopting the interpretation that would provide standing and relief for this violation of a well-established public right, the lower court chose to adopt a perverse interpretation that conflicts with existing precedent, common law, and constitutional principles. This decision threatens the reputation and integrity of the judicial process by creating a rule that administrative tribunals are exempt from transparency, even when they are deciding the health care rights of millions of Georgians, and by further holding that no member of the public can challenge that rule.

Accordingly, the lower court should be reversed.

This 1st day of May, 2023.

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CERTIFICATE OF SERVICE

Pursuant to O.C.G.A. § 5-6-32 (a) and Ga. Supreme Court Rule 14, prior to filing, I have served a copy of the foregoing via U.S. mail upon the following:

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IN THE SUPREME COURT OF GEORGIA

GEORGIA FIRST AMENDMENT FOUNDATION, Petitioner, v. REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Plaintiff-Respondents, and FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Defendant-Respondents.	Court of Appeals Case No. A23D0265 Supreme Court Case No. _____

INDEX TO THE GEORGIA FIRST AMENDMENT FOUNDATION'S PETITION FOR WRIT OF CERTIORARI

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Tab	Description
1.	Georgia Access to Medical Cannabis Commission's Post-Award Protest Procedures
2.	Prehearing Order of Administrative Law Judge issued at OSAH during the Post-Award Protests (May 12, 2022)
3.	Administrative Law Judge's Order issued at OSAH, sealing the record in its entirety (Jun. 23, 2022)
4.	GFAF's Motion to Unseal in the nature of an administrative appeal, filed in the Superior Court of Fulton County (Sept. 28, 2022)
5.	Exhibit to Tab 4, Motion to Seal Hearing Records filed by FFD Georgia Holdings, LLC; Theratrue Georgia, LLC; Natures GA, LLC; and Treevana Remedy, Inc. at OSAH (Jun. 6, 2022)
6.	GFAF's Reply Brief, filed in the Superior Court of Fulton County (Nov. 7, 2022)
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13.	Notice of Intent to Apply for Certiorari to the Supreme Court of Georgia (Apr. 13, 2023)

TAB 1

ATTACHMENT D

Georgia Access to Medical Cannabis Commission Administrative Protest Procedures

The Georgia Access to Medical Cannabis Commission (the "Cannabis Commission") has adopted both a Pre-Award and a Post-Award Protest Procedure pursuant to the authority granted to it in O.C.G.A. § 16-12-210(a)(3) of the Georgia Hope Act (the "Hope Act"). The Cannabis Commission has adopted the Pre-Award and Post-Award Protest Procedures to provide applicants an opportunity to challenge both the process of the competitive application request for proposal and grant of the Notice of Intent to Award a contract while maintaining and preserving the confidentiality requirements set forth in O.C.G.A. § 16-12-220(a). The Pre-Award Protest Procedure ("Pre-Award Protest Procedure") shall apply exclusively to a challenge to the process of the competitive application request for proposals for the grant of a Class 1 or Class 2 production license with respect to any events or facts arising regarding the process prior to the closing date. Any protest or issue that could have been raised during the Pre-Award Protest stage but was not raised shall be waived. The Post-Award Protest Procedure shall apply exclusively to a challenge of a Notice of Intent to Award a Class 1 or Class 2 production license by contract through a competitive sealed bid or competitive sealed proposal, pursuant to O.C.G.A. § 16-12-221(a) of the Hope Act, after the closing date.

Cannabis Commission Pre-Award Protest Procedure

The Pre-Award Protest Procedure set forth herein does not apply to a license revocation, suspension, cancelation, or termination or to a decision of the Cannabis Commission to deny a license transfer under O.C.G.A. §§ 16-12-222 and 16-12-223, or to any protest challenging the Notice of Intent to Award issued after the closing date. Any protest or challenge to the Notice of Intent to Award issued pursuant to the competitive application request for proposals and arising after the closing date must comply with the Georgia Access to Medical Cannabis Commission Administrative Post-Award Protest Procedure.

Section 1.0. Pre-Award Protest Process. Any prospective applicant that is (a) capable of responding to the competitive application request for proposals; and (b) that maintains a direct economic interest in the competitive application request for proposals may submit a written protest to the Deputy Commissioner of State Purchasing for the Georgia Department of Administrative Services with respect to any events or facts arising regarding the conduct of the competitive application request for proposals process prior to the closing date: including, but not limited to, a challenge to instructions, application, procedures, pre-award or post-award protest procedures, requirements, or specifications provided for in the competitive application request for proposals

instructions, subject to the prospective applicant's compliance with the provisions of these protest procedures.

A protest involving such a challenge is considered to be properly filed when it is in writing and signed by a company officer authorized to sign contracts on behalf of the applicant or potential applicant, is submitted via e-mail to protests@doas.ga.gov, and is received by the Deputy Commissioner within ten (10) calendar days after the protesting party knows or should have known of the occurrence of the action which is protested or two (2) business days prior to the closing date and time of the competitive application request for proposals as published on the Georgia Procurement Registry at the time that the protest was received, whichever date is earlier. If an applicant or potential applicant fails to file a protest by the applicable deadline, the Department of Administrative Services ("DOAS") may, at its discretion, deem such failure as the applicant or potential applicant's voluntary relinquishment of any grounds the applicant or potential applicant may have for protesting through this protest process or through subsequent litigation.

If a protest involving a challenge to the conduct of the competitive application request for proposals with respect to any events or facts regarding the process prior to closing date has been timely filed, the competitive application request for proposals will not close until a final decision resolving the protest has been issued, unless the State Purchasing Division Deputy Commissioner makes a written determination that the closing of the competitive application request for proposals without delay is necessary to protect the interests of the state.

Section 2.0. Request for Formal Review/Appeal Process. The Deputy Commissioner's pre-award protest decision is subject to formal review by the DOAS Commissioner upon request by the potential applicant filing the protest, or any potential applicant adversely impacted by the protest decision, provided that the potential applicant is (a) capable of responding to the competitive application request for proposals; and (b) that maintains a direct economic interest in the competitive application request for proposals, or the Cannabis Commission. Any request for formal review must be submitted to the DOAS Commissioner via e-mail at protests@doas.ga.gov. Such request for formal review must be received by the DOAS Commissioner within three (3) business days of issuance of the protest decision. The request for formal review must be in writing and identify any errors in the protest decision as well as the factual and legal grounds upon which reversal or modification of the protest decision is deemed and warranted. The parties involved in the protest have a right to a hearing before the DOAS Commissioner. If a hearing is requested, the DOAS Commissioner, or designee, shall issue a Procedural Order, scheduling and providing details for a hearing.

The parties may submit documentary evidence and witness testimony in the form of affidavits prior to the hearing. The DOAS Commissioner may solicit additional information from the parties prior to the hearing or at any time prior to the issuing of the final decision. Issues not raised in the initial protest or issues not raised in the initial request for formal review may, at the discretion of the DOAS Commissioner, be deemed

voluntarily relinquished. The protesting party may request that the hearing be conducted before a court reporter. Such request must be in writing and include an agreement by the protesting party that it shall secure and pay for the court reporting services for such hearing. To be made part of the record, the original transcript of any such proceedings shall be submitted to the DOAS Commissioner as soon as the transcript is available, without cost. The DOAS Commissioner will make a decision on the protest as expeditiously as possible after receiving all relevant requested information. The decision of the DOAS Commissioner will be the final DOAS action regarding the protest. No motion for reconsideration shall be considered.

Section 3.0. Relief, Burden of Proof, and Standard of review. There is no such thing as a perfect procurement. Thus, a protestor must show prejudice, not mere error, for not every error compels the requested relief. Rather, it is the significance of errors in the procurement process that determines whether the relief is appropriate, and it is the protestor who bears the burden of proving error in the procurement process sufficient to justify relief. The presence of multiple nonmaterial issues in a competitive application request for proposal process, including, but not limited to, the instructions, application, procedures, pre-award or post-award protest procedures, requirements, or specifications provided for in the competitive application request for proposals instructions, does not constitute a material issue unless the protestor can establish those nonmaterial issues together would prejudice the outcome of the procurement.

The following general principles shall apply in the review of protests:

- The standard for reviewing the competitive application request for proposals process, including, but not limited to, the instructions, application, procedures, pre-award or post-award protest procedures, requirements, or specifications provided for in the competitive application request for proposals instructions, is one of deference to any reasonable judgment of the Cannabis Commission or DOAS.

- In order to demonstrate that the application request for proposal process, including, but not limited to, the instructions, applications, procedures, pre-award or post-award protest procedures, requirements, or specifications provided for in the competitive application request for proposals instructions, is improper, a protester cannot merely suggest an alternative competitive application request for proposal process; it is required to establish that the decision concerning the competitive application request for proposals process lacked a reasonable basis.

- Governmental officials and state entities are presumed to act in good faith, and a protester's contention that procurement officials, including but not limited to Commissioners, personnel of the Cannabis Commission, DOAS and its personnel, are motivated by bias or bad faith will not be considered unless supported by convincing proof.

- Patent ambiguities must be challenged prior to close of the competitive application request for proposal. An applicant who chooses to compete under a

patently ambiguous competitive application request for proposal does so at its own peril and cannot later complain when the Cannabis Commission, including, but not limited to, Commissioners, personnel of the Cannabis Commission, or evaluation team members, proceeds in a manner inconsistent with one of the possible interpretations.

Section 4.0. **Costs.** In no event will a party to a protest be entitled to recover any costs incurred in connection with the competitive application request for proposals or protest process, including, but not limited to, the costs of filing a written protest or response to a written protest, the cost of preparing and submitting an application, the costs of participating in a protest, or any attorneys' fees.

Section 5.0. Waiver. A party's or applicant's failure to strictly comply with the Pre-Award Protest Procedure or to raise any challenge to the competitive application request for proposals process prior to the closing date waives any and all rights for protesting or participating in any protest and further waives any and all rights to bring such claims in subsequent administrative appeals or litigation.

Cannabis Commission
Post-Award Protest Procedure

The Cannabis Commission adopts this Post-Award Protest Procedure for the grant of a Class 1 or Class 2 production license awarded by contract through a competitive sealed bid or competitive sealed proposal, pursuant to O.C.G.A. § 16-12-221(a) of the Georgia Hope Act (the "Hope Act"). The Post-Award Protest Procedure set forth herein shall be administered exclusively by the Cannabis Commission and does not apply to a license revocation, suspension, cancelation, or termination or to a decision of the Cannabis Commission to deny a license transfer under O.C.G.A. §§ 16-12-222 and 16-12-223, or to any protest or challenge to the competitive application request for proposals arising prior to the closing date. Any protest or challenge to the competitive application request for proposals arising prior to the closing date must comply with the Georgia Access to Medical Cannabis Commission Administrative Pre-Award Protest Procedure. Any claim or protest that could have been raised in the Pre-Award Protest Procedure but was not shall be deemed waived and may not be brought in subsequent litigation.

Section 1.0. Interested Applicant and Waiver. This Post-Award Protest Procedure is only available to an "interested applicant," which is defined to mean an actual or prospective applicant with a direct economic interest in the procurement of a Class 1 or Class 2 production license. In protest challenges related to the evaluation of bids and proposals and the award of contracts, this generally means an applicant that would potentially be in line for award if the protest were sustained. An interested applicant must follow this Post-Award Protest Procedure strictly. An interested applicant's failure to strictly comply with the Post-Award Protest Procedure waives any and all rights for protesting or participating in any protest of the intent to award a contract by the Cannabis Commission and further waives any and all rights to bring or participate in any subsequent litigation.

Section 2.0. Written Protest. A protest challenging the intended contract award to a prospective licensee must be filed by the interested applicant in writing with the Executive Director of the Cannabis Commission ("Executive Director") or designee of the Cannabis Commission ("designee") within seven (7) business days after the issuance of the Notice of Intent to Award a contract. The written protest must identify and provide/produce, at a minimum, the name and address of the interested applicant, the specific Notice of Intent to Award that is being protested, the factual and legal bases for the protest, supporting exhibits, evidence, or documents to substantiate any claims, the relief that the interested applicant seeks, and a redacted copy of the application (which application shall be redacted only to the extent authorized, and in compliance with Article 4 of Chapter 18 of Title 50) that the interested applicant submitted to the Cannabis Commission in response to the competitive application request for proposal. Except as provided for in Section 2.3, claims and/or grounds for protest that are not

expressly raised during the protest filing period are voluntarily waived by the interested applicant and may not be introduced by the interested applicant at any time during the protest process or any subsequent litigation.

Section 2.1. Filing Protests. A protest is considered to be properly filed when it is in writing and signed by a company officer authorized to sign contracts on behalf of the interested applicant, is submitted via e-mail to protest@gmcc.ga.gov, and is received by the Executive Director or designee within the filing period set forth in Section 2.0 above. The Executive Director or designee may dismiss without a hearing a written protest for failure to comply with the filing requirements of this Section or Section 2.0.

Section 2.2. Prospective Licensee's Right to Respond. Within seven (7) business days of receipt of the written protest filed by an interested applicant, a prospective licensee shall be permitted, but not required, to file a written response to the Executive Director or designee.

Section 2.3. Confidentiality and Amendment. Pursuant to O.C.G.A. § 16-12-220(a), "[a]ll working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to [Part 2 of the Hope Act], other than information published in an official commission report regarding the activities conducted pursuant to [the Hope Act], shall be confidential data and shall not be subject to Article 4 of Chapter 18 of Title 50; provided, however, that any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to [the Hope Act] shall be subject to Article 4 of Chapter 18 of Title 50." Accordingly, in order to facilitate a meaningful protest process, a copy of the applicant-signed contract document shall be released with the Notice of Intent to Award and shall be redacted in accordance with Article 4 of Chapter 18 of Title 50 of the Official Code of Georgia Annotated.

To the extent an interested applicant protesting the Notice of Intent to Award the contract or prospective licensee alleges that it requires any redacted information from a prospective licensee's application that is an exhibit to the applicant-signed contract document, an interested applicant's application, or the evaluation sheets to substantiate any of the claims and/or grounds for its protest set forth in a timely filed written protest or response, the interested applicant and prospective licensee shall confer without delay with opposing counsel in a good faith effort to agree on the terms for the disclosure of any redacted information in the prospective licensee's application or the evaluation sheets to an interested applicant, as well as the disclosure of any information in the interested applicant's redacted application or evaluation sheets to a prospective licensee to assist in its contention that the protest should not be sustained, including, but not limited to, entering into a confidentiality agreement. If the interested applicant and a prospective licensee are unable to agree on the disclosure of information in their respective applications or evaluation sheets, the Executive Director or designee, in his or her capacity as a hearing officer, shall have the authority to determine whether the requested information should be disclosed and the terms for such disclosure, including,

but not limited to, an in camera review of the requested information, the entry of an order setting forth the terms of any disclosure of information, and the entry of a protective order. Upon the disclosure of any confidential or redacted information in an application or evaluation sheet to an interested applicant or prospective licensee pursuant to this Section, the interested applicant or prospective licensee shall have seven (7) business days from the date of the disclosure in which to amend its protest or its response to specifically address any of the disclosed information. Any attempt to amend the protest or response beyond that which can be reasonably connected by the interested applicant or prospective licensee to the disclosure of any confidential or redacted information in an application or evaluation sheet pursuant to this Section shall not be considered by the hearing officer. To further maintain confidentiality as required under the Hope Act, the Georgia Department of Administrative Services shall be excluded from and play no role in the evaluation of the applications, the determination of any award of contract or license, or this Post-Award Protest Procedure and shall have no access to confidential working papers, recorded information, documents, or copies produced by, obtained by, or disclosed to the Cannabis Commission.

Section 3.0. Protest Hearing Procedure. The hearing held under this Post-Award Protest Procedure shall be only as formal as is necessary to preserve order and be compatible with the principles of justice. The Executive Director or designee shall serve as the hearing officer during the protest process. Upon receipt of a timely written protest, the Executive Director or designee shall schedule a hearing. The Executive Director or designee shall also post a copy of the written protest on the Cannabis Commission's website, https://www.gmcc.ga.gov, including a redacted copy of the protestor's application, which shall serve as notice of the filing of the protest to the prospective licensee identified in the written protest and any other interested applicant or prospective licensee. The Executive Director or designee may also provide additional notice in his or her sole discretion.

Section 3.1. Representation of Counsel. Both the interested applicant and any prospective licensee shall have the right to be represented by legal counsel at their own expense at all levels of the protest process.

Section 3.2. Pre-Hearing Status Conference/Confidentiality. Prior to the hearing, the hearing officer may schedule a status conference with the interested applicant and prospective licensee to address scheduling issues, evidentiary concerns, or, where appropriate, to resolve any issues related to the disclosure of redacted information in the interested applicant or prospective licensee's application or evaluation sheets as set forth in Section 2.3. The hearing officer may, in his or her sole discretion, also review any confidential Cannabis Commission data in camera and enter a protective order or any other appropriate order necessary to maintain the confidentiality of Cannabis Commission data as required under O.C.G.A. § 16-12-220(a). The interested applicant and any prospective licensee shall be strictly bound by any such order, and the hearing officer may condition the disclosure of any such data upon entry of such order.

Section 3.3. **Hearing**. Both the interested applicant and prospective licensee shall have a right to appear before the hearing officer for oral argument. The interested applicant and prospective licensee shall also have the right to submit briefs, documents, and witness testimony in the form of affidavits no later than five (5) business days before the scheduled hearing. The hearing officer may also solicit additional information from the interested applicant or prospective licensee after the hearing and prior to the issuing of the final decision. The hearing officer may also order sealed any portion of the record upon request of any of the parties or upon his own accord.

Section 3.4. Relief, Burden of Proof, and Standard of review. There is no such thing as a perfect procurement. Thus, a protestor must show prejudice, not mere error, for not every error compels revision or cancellation of the notice of intent or re-evaluation and re-award (collectively the "relief"). Rather, it is the significance of errors in the procurement process that determines whether the relief is appropriate. The protestor shall bear the burden of proving error in the procurement process sufficient to justify relief. Protests must demonstrate a reasonable possibility of competitive prejudice; in effect, but for the Cannabis Commission's actions, the protesting party would have had a substantial chance of receiving an award. The presence of multiple nonmaterial issues in a Notice of Intent to Award does not constitute a material issue unless the protestor can establish those nonmaterial issues together would prejudice the outcome of the procurement.

The following general principles shall apply in the review of protests:

- The standard for reviewing the evaluation of applications is one of deference to any reasonable judgment of the Cannabis Commission or of the evaluation team.

- A protesting party's simple disagreement with the evaluation team provides no basis for reversing the evaluation team's determination and categorization of whether a prospective licensee met one of the specifications/requirements, allocation of points, or both.

- In order to demonstrate that the Cannabis Commission's evaluation was improper, a protester cannot merely suggest alternative methodologies or conclusions; it is required to establish that the Cannabis Commission's actual evaluation lacked a reasonable basis.

- Governmental officials and state entities are presumed to act in good faith, and a protester's contention that procurement officials, including but not limited to Commissioners, personnel of the Cannabis Commission, and evaluation team members, are motivated by bias or bad faith will not be considered unless supported by convincing proof.

- The composition of an evaluation team is within the sole discretion of the Cannabis Commission. The qualifications or the composition of an evaluation team

may not be questioned unless the protester provides convincing proof of bad faith, conflict of interest, or actual bias.

• Patent ambiguities must be challenged prior to close of the competitive application request for proposal. A supplier who chooses to compete under a patently ambiguous competitive application request for proposal does so at its own peril and cannot later complain when the Cannabis Commission, including, but not limited to, Commissioners, personnel of the Cannabis Commission, or evaluation team members, proceeds in a manner inconsistent with one of the possible interpretations.

Section 3.5. Court Reporter. Either the interested applicant or the prospective licensee shall have the right to have a court reporter transcribe the Hearing, but any such cost shall be paid by the party requesting the court reporter. To be made part of the record, the original transcript of any such hearing shall be submitted to the hearing officer by the party requesting the court reporter as soon as the transcript is available, without cost to the hearing officer or the Cannabis Commission.

Section 3.6. Protest Decision. The hearing officer will issue a written decision on the protest as soon as is reasonably practical after the hearing and receiving all relevant requested information from the Cannabis Commission, the interested Applicant, and, where necessary, the prospective licensee. The decision of the hearing officer shall be the final decision of the Cannabis Commission and there shall be no additional administrative appeals. The failure to comply with these Post-Award Protest Procedures shall be deemed to constitute a waiver of the party's appeal rights.

Section 4.0. **Costs.** In no event will a party to a protest be entitled to recover any costs incurred in connection with the solicitation or protest process, including, but not limited to, the costs of filing a written protest or response to a written protest, the cost of preparing and submitting an application, the costs of participating in a protest, or any attorneys' fees.

TAB 2

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

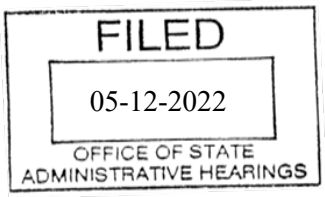
HARVEST CONNECT LLC,
Petitioner,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC; and
TREEVANA REMEDY, INC.;
Respondents.

Docket No.: 2226126
2226126-OSAH-GMCC-PL-60-Howells

Agency Reference No.: 2021-PRO-0012



PREHEARING ORDER

Pursuant to O.C.G.A. § 50-13-13 and Rule 616-1-2-.22 of the Office of State Administrative Hearings ("OSAH"), and in furtherance of the orderly, efficient, and expeditious resolution of this matter, **IT IS HEREBY ORDERED** as follows:

1.

Conference Regarding Disclosure of Redacted Information: To the extent an interested applicant protesting the Notice of Intent to Award the contract (i.e., license), or the prospective licensee, alleges that it requires any redacted information from the opposing party's application, or the evaluation sheets to substantiate any of the claims or grounds for its protest or response, the parties and/or their counsel shall confer without delay and within **ten (10) business days of the entry of this Prehearing Order**. The purpose of the conference is to make a good faith effort to agree on the terms for disclosure of any redacted information, including entering into a confidentiality agreement.

2.

Notice to the Court Regarding Disclosure Agreements: If the parties reach, or do not reach, an agreement regarding disclosure of redacted information, the interested applicant shall file a Status Report with the court, no later than **twelve (12) business days from the entry of this Prehearing Order**. If the parties are successful and have entered into a confidentiality agreement, the interested applicant shall file the confidentiality agreement with the status report.

3.

Request for In Camera Review: If the parties are unable to reach an agreement regarding the disclosure of redacted information, either party shall have **three (3) business days from the date of filing the status report** to request the court to conduct an in camera review to determine whether any redacted information should be disclosed and the terms for such disclosure.

4.

Opposition to In Camera Review and/or Disclosure of Redacted Information: Upon the filing of a request for in camera review, the opposing party shall have **three (3) business days** to file an opposition to the request for in camera review. Any opposition to in camera review or subsequent disclosure of redacted information shall be made with the understanding that access to redacted information may be required for a meaningful protest process and blanket assertions of confidentiality will not be considered.

5.

Request to Seal Record: Any party may request that any portion of the record be sealed, or the court may on its own accord determine that the record, or any portion thereof, shall be sealed. Requests to seal the record should be made by filing a motion pursuant to Ga. Comp. R. & Regs. 616-1-2-.16.

6.

Deadline to Amend Protest or Response: Upon disclosure of any confidential or redacted information, a party shall have **seven (7) business days, from the date of the disclosure**, to amend its protest or response. The amendment shall be limited to that which is necessary to address the disclosed information. Any attempt to amend the protest or response beyond this limited scope will not be considered.

7.

Request for Prehearing Conference: Any party may request a prehearing telephone conference. Participants in a prehearing telephone conference would include the Administrative Law Judge, the parties, and their attorneys, if any. To request a prehearing conference, the parties are directed to file a motion requesting the conference.

8.

Motions for Summary Determination and Motions to Dismiss Not Allowed: Given the need for expeditious resolution of these matters, the parties will be limited to the Post-Award Procedures as set forth by the Commission. The parties shall not be allowed to file motions for summary determination or motions to dismiss. Rather, any such arguments should be addressed in the briefs allowed by the Post-Award Procedures.

9.

Briefs, Supporting Documents, and Witness Testimony: No later than **five (5) business days** before the hearing, the parties shall file with the court, and serve on the opposing party, their briefs, supporting documents, and witness testimony in the form of affidavits. Briefs are limited to thirty (30) pages, double spaced and shall use 12 pt. Times New Roman Font. No response briefs will be allowed.

10.

Filing: The parties are encouraged to file their pleadings, motions, status reports, etc. via OSAH's ePortal, https://eportal.osah.ga.gov.

11.

Hearing: The hearing will consist of oral argument. The interested applicant's argument shall be limited to thirty (30) minutes. Prospective licensees' arguments shall be limited to twenty (20) minutes. The interested applicant shall be entitled to a ten (10) minute rebuttal.

12.

Default: The failure of a party to participate in any stage of this proceeding, to file any required pleading, or to comply with any order issued by the Administrative Law Judge, including the provisions of this Prehearing Order, may result in the entry of a default order against the offending party. Ga. Comp. R. & Regs. 616-1-2-.30(1).

13.

Modification of Prehearing Order: This order shall control the subsequent course of this proceeding, unless modified by a subsequent order.

SO ORDERED, this 12th day of May, 2022.

Stephanie M. Howells

Stephanie M. Howells
Administrative Law Judge

TAB 3

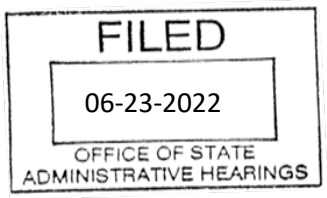
ACC, LLC,
Petitioner,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC; and
TREEVANA REMEDY, INC.;
Respondents.

Docket No.: 2226148
2226148-OSAH-GMCC-PL-60-Howells

Agency Reference No.: 2021-PRO-00011



ASPIRE MEDICAL PARTNERS, LLC,
Petitioner,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC; and
TREEVANA REMEDY, INC.;
Respondents.

Docket No.: 2226133
2226133-OSAH-GMCC-PL-60-Howells

Agency Reference No.: 2021-PRO-00002

CUMBERLAND CURATIVE LLC,
Petitioner,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC; and
TREEVANA REMEDY, INC.;
Respondents.

Docket No.: 2226123
2226123-OSAH-GMCC-PL-60-Howells

Agency Reference No.: 2021-PRO-00008

GA BIOSCIENCE RESEARCH, INC.,
Petitioner,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC; and
TREEVANA REMEDY, INC.;
Respondents.

Docket No.: 2226134
2226134-OSAH-GMCC-PL-60-Howells

Agency Reference No.: 2021-PRO-00003

HARVEST CONNECT LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226126** **2226126-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-0012**
PEACH HEALTH ALTERNATIVES, LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226127** **2226127-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00013**
PEACH STATE MEDICINALS, LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226140** **2226140-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00005**

PURE BEAUTY GA, LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226144** **2226144-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00007**
PURE PEACH ORGANIC, INC., **Petitioner,** **v.** **FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226125** **2226125-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00010**
REMEDIUM LIFE SCIENCE OF GEORGIA LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226131** **2226131-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00015**

REVOLUTION GEORGIA LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.,** **Respondents.**	**Docket No.: 2226065** **2226065-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00001**
SILVERLEAF HEALTH ALTERNATIVES INC., **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226128** **2226128-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00014**
SYMPHONY MEDICAL LLC, **Petitioner,** **v.** **FFD GA HOLDINGS, LLC;** **THERATRUE GEORGIA, LLC;** **NATURES GA, LLC; and** **TREEVANA REMEDY, INC.;** **Respondents.**	**Docket No.: 2226124** **2226124-OSAH-GMCC-PL-60-Howells** **Agency Reference No.: 2021-PRO-00009**

ORDER GRANTING MOTION TO SEAL

On June 6, 2022, the respondents in the above styled cases filed their Joint Motion to Seal. The Petitioners in the following cases have opposed respondents' motion: *Cumberland Curative, LLC v. FFD GA Holdings, LLC, et al*., Docket No. 2226123-OSAH-GMCC-PL-60-Howells; *Aspire Medical Partners, LLC v. FFD GA Holdings, LLC, et al*., Docket No. 2226133-

OSAH-GMCC-PL-60-Howells; and *Peach State Medicinals, LLC v. FFD GA Holdings, LLC, et al*., Docket No. 2226140-OSAH-GMCC-PL-60-Howells.

To the extent the respondents seek the record in these matters to be exempt from open records requests, the motion is **GRANTED**. Pursuant to Georgia Code Section 16-12-220, these matters have been designated as confidential. Accordingly, any documents submitted or filed, any transcripts, or recordings are not subject to the Georgia Open Records Act and therefore will not be publicly disclosed. Furthermore, the hearing in these cases and in all cases referred to the Office of State Administrative Hearings ("OSAH") by the Georgia Access to Medical Cannabis Commission ("Commission") will be closed to the public, and to non-parties, their representatives, and their counsel.

SO ORDERED, this 23rd day of June, 2022.

Stephanie M. Howells

Stephanie M. Howells
Administrative Law Judge

TAB 4

Fulton County Superior Court
EFILEDJT
Date: 9/28/2022 2:35 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

136 PRYOR STREET, ROOM C-103, ATLANTA, GEORGIA 30303

SUMMONS

Revolution Georgia LLC et al.
Plaintiff,

vs.

FFO GA Holdings, LLC et al.
Defendant

Case No.: 2022CV370799

TO THE ABOVE NAMED DEFENDANT(S):

You are hereby summoned and required to file electronically with the Clerk of said Court at https://efilega.tylerhost.net/ofsweb (unless you are exempt from filing electronically) and serve upon plaintiff's attorney, whose name and address is:

Gerald Weber
P.O. Box 5391
Atlanta, GA 31107

Joy Ramsingh
1037 Marion Oaks Ct
Macon, GA 31216

An answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service; unless proof of service of this complaint is not filed within five (5) business days of such service. Then time to answer shall not commence until such proof of service has been filed. **IF YOU FAIL TO DO SO, JUDGMENT BY DEFAULT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

This 9/28/2022 day of _____, 20___

Honorable Cathelene "Tina" Robinson
Clerk of Superior Court
By _____
Deputy Clerk

To defendant upon whom this petition is served:
This copy of complaint and summons was served upon you _____, 20_____

Deputy Sherriff

Instructions: Attach addendum sheet for additional parties if needed, make notation on this sheet if addendum is used

Fulton County Superior Court
EFILEDJT
Date: 9/28/2022 2:35 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:

REVOLUTION GEORGIA LLC,
ASPIRE MEDICAL PARTNERS LLC,
GA BIOSCIENCE RESEARCH INC.,
CURALEAF GA HOLDINGS LLC,
PEACH STATE MEDICINALS LLC,
PURE BEAUTY GA LLC,
CUMBERLAND CURATIVE LLC,
SYMPHONY MEDICAL LLC,
PURE PEACH ORGANIC INC.,
ACC LLC, PEACH HEALTH
ALTERNATIVES LLC,
HARVEST CONNECT LLC,
SILVERLEAF HEALTH ALTERNATIVES
INC., and
REMEDIUM LIFE SCIENCE OF GEORGIA
LLC,

Petitioners,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC;
and TREEVANA REMEDY, INC.,

Respondents.

2022CV370799

Case No. _____

NONPARTY GEORGIA FIRST AMENDMENT FOUNDATION'S MOTION TO UNSEAL (IN THE NATURE OF AN APPLICATION FOR INTERLOCUTORY REVIEW)

The Georgia First Amendment Foundation requests that this Honorable Court review and amend an administrative order placing a blanket seal on medical cannabis court records, under Uniform Superior Court Rule 21 and Georgia's common law and constitutional right of access.

In support, the Foundation states as follows:

1. Rule 21, which governs access to court records, provides that any person, at any time, may challenge an order limiting access to court records by filing an interlocutory application[1] with the appellate court that has jurisdiction to hear the appeal. Ga. Unif. Super. Ct. R. 21.4-5; *see also* O.C.G.A. § 50-13-19(b) (providing for this Honorable Court's appellate jurisdiction and venue); O.C.G.A. § 50-13-19(h) (providing that an appeal is proper when an administrative decision is made upon unlawful procedure or other error of law).
2. Upon notice and a hearing, the reviewing court may amend the order limiting access to court records, for good cause. Ga. Unif. Super. Ct. R. 21.5.
3. The standard of review as to the issue of limiting access to court records is abuse of discretion. *See Savannah Coll. of Art & Design v. Sch. of Visual Arts, Inc*., 270 Ga. 791, 791 (1999).

BACKGROUND

4. In April 2019 the General Assembly passed "Georgia's Hope Act," which authorizes the Georgia Access to Medical Cannabis Commission to oversee the regulated licensing of limited, in-state cultivation, production, manufacturing, and sale of low-THC oil as well as dispensing to registered patients on the state's Low-THC Oil Registry. *See* O.C. G. A. § 16-12-200 *et seq*.

[1] Georgia's Supreme Court declared that litigants seeking appellate review should style their Uniform Superior Court Rule 21 motions as applications for interlocutory appeal, to avoid creating the equivalent of a direct action where the Supreme Court would otherwise exercise its discretion to hear a matter. *See In re Atlanta J.-Const.,* 269 Ga. 589 (1998). It is unclear whether these instructions extend to situations where there is appeal as of right, but in an abundance of caution, this matter is styled in accordance with the Court's guidance. Nevertheless, due to Rule 21's separate procedural framework, these appeals are not subject to appellate timeliness or certification requirements. *Merch. L. Firm, P.C. v. Emerson*, 301 Ga. 609, 612 n. 2 (2017) ("…although a person not a party to an underlying case must file an application for review, that person need not follow the interlocutory procedures provided by O.C.G.A. § 5-6-34 (b)").

5. Given that medical cannabis was previously inaccessible in Georgia and the fact that the Commission's activities are funded by Georgia's taxpayers, all aspects of the Hope Act's implementation are of elevated interest to the public and the media.
6. Several legal protests emerged from the Commission's licensing of medical cannabis dispensaries. Upon information and belief, several of these disputes were docketed at No. 2226123-OSAH-GMCC-PL-60-Howells in the Office of State Administrative Hearings.
7. During that action, several parties moved to seal the record in that matter. *See* Ex. A.
8. The seal was formally opposed by at least one party to the case. *See* Ex. B.
9. Although the seal was opposed and the records are clearly of significant public interest, the administrative law judge issued an order sealing the entire record— without holding a hearing on that issue. *See* Ex. C.
10. The Foundation submitted an Amicus Curiae brief relating to the seal. *See* Ex. D. Just after, the Foundation learned that the OSAH had issued an order sealing the record, foreclosing the opportunity for the Foundation to provide its perspective.
11. The Foundation advocates for the rights of citizens, journalists, and public servants to gather information about the operation and performance of government institutions.
12. The Foundation is a nonpartisan, nonprofit coalition.
13. Along with most coalitions in other states, it is a member of the National Freedom of Information Coalition, and it is the only nonprofit organization in the state of Georgia dedicated to advancing access to public information.
14. Its members and leadership include some of Georgia's finest journalists, media organizations, attorneys, and citizens.

15. For almost thirty years, the Foundation has helped journalists access public information as they carry out their constitutional function. Part of this important mission includes supporting access to public information, including access to court records. Without access to information of public interest, the press cannot fulfill its obligation to inform the public.
16. The Foundation has no legal interest in the substance of the licensing protests.
17. This Motion merely asks this Court to address the narrow issue of whether access to these court records was properly limited.

ARGUMENT

An important medical cannabis dispute in the Office of State Administrative Hearings has been shrouded with secrecy—a blanket seal was imposed without a hearing, without findings of fact necessitating closure, and without consideration to common law and procedural rules governing access to court records.

Although the informal administrative setting permits relaxation of procedural rules to facilitate resolution, the Administrative Rules of Procedure instruct administrative law judges to refer to the Uniform Rules for Superior Courts, and the common law right of access to court records cannot be ignored. *See* OSAH Administrative Rule of Procedure 616-1-2-.02(3).

Several parties filed a cursory, single paragraph argument requesting a blanket seal of the record. *See* Ex. A. Without a hearing, the OSAH disregarded the opposition to sealing the record (including an opposing brief, its argument, and citations) and immediately issued an order denying access. The order does not reflect any consideration of the longstanding presumption of access to court records in this state. *See* Ex. C.; *cf.* Ga. Code Ann. § 50-13-41(c) ("Every

decision of an administrative law judge shall contain findings of fact, conclusions of law, and a disposition of the case.")

The Hope Act provides some limitations on accessing medical cannabis records under the Open Records Act. *See* O.C.G.A. § 16-12-220. But it does not address judicial records, it does not provide a mechanism to seal judicial records, it does not address judicial proceedings, and it does not provide a mechanism to close judicial proceedings to the public. *See id*. The public interest in these records and the media's interest in informing the public demand immediate interlocutory review of this seal.

I. OSAH's Errors of Law

The order provides:

> To the extent the respondents seek the record in these matters to be exempt from open records requests, the motion is GRANTED. Pursuant to Georgia Code Section 16-12-220, these matters[2] have been designated as confidential. Accordingly, any documents submitted or filed, any transcripts, or recordings are not subject to the Georgia Open Records Act and therefore will not be publicly disclosed. Furthermore, the hearing in these cases and in all cases referred to the Office of State Administrative Hearings ("OSAH") by the Georgia Access to Medical Cannabis Commission ("Commission") will be closed to the public, and to non-parties, their representatives, and their counsel.

There are three separate legal processes improperly comingled: (1) obtaining court records under Rule 21 and common law, (2) obtaining public records through the Open Records Act, and (3) gaining physical or virtual access to Georgia's court proceedings under Rule 22 and common law.

The first error is the substitution of the Open Records Act for the common law and procedural rules governing access to the courts. The process for sealing court records is dictated by Rule 21, not the Open Records Act or any statutory exemption to it. As a general rule, the

[2] To the extent that the term "matters" refers specifically to legal proceeding(s), there is no mention of closed legal proceedings in the section of the Hope Act cited by the lower court.

Open Records Act does not apply to judicial agencies. *See Fathers Are Parents Too Inc. v. Hunstein,* 202 Ga. App. 716 (1992). So even if the Hope Act cuts off access to some records under the Open Records Act, that limitation is distinct from sealing court records under common law and procedural court rules.

There are two additional issues—ripeness and jurisdiction. For the OSAH to come to the legal conclusion that the Open Records Act did not apply to the documents in its case record, there would need to be an underlying question related to the record's accessibility under the Open Records Act, which there was not. *See In Int. of I.B.,* 219 Ga. App. 268, 270 (1995) ("A controversy is justiciable when it is definite and concrete, rather than being hypothetical, abstract, academic, or moot.") Nor would there ever be, because only a superior court would review an Open Records Act dispute, even if the request sought records from OSAH. *See* O.G.C.A § 50-18-73(a) (vesting jurisdiction as to Open Records Act enforcement actions in the superior courts).

Administrative Rule of Procedure 616-1-2-.23 (Record of Hearings) presumes that the administrative hearing record "shall be available to the public, except as provided by law according confidentiality." While the administrative procedural rule lacks a specific structure for determining whether the record should be closed, Uniform Superior Court Rule 21 sets forth instructive procedures that must be followed before records may be sealed.[3] *See In re Motion of the Atlanta Journal-Constitution*, 271 Ga. 436, 437 (1999) ("…courts may restrict or prohibit access to court records only if they do so in compliance with the requirements of Rule 21.").

[3] Administrative Rule of Procedure 616-1-2-.02(3), which governs OSAH hearings, provides that the ALJ may refer to the Uniform Rules for the Superior Courts to resolve procedural questions that are not addressed by the APA, other applicable law, or the Administrative Rules of Procedure.

Although court rules indicate that access to court records is presumed, Georgia's fierce favor for open courtrooms and records did not originate with procedural rules. The citizen's ability to access court records and proceedings flows from Georgia's Constitution, and has been interpreted broadly by the Georgia Supreme Court:

> [O]ur court has breathed life into some old words that have lain dormant within our Constitution for most of their century old existence. The words are: "Public officers are the trustees and servants of the people and are at all times amenable to them." We have established that this is no empty phrase, but an obligation that is enforceable in a court of law. Public men and women, above all others, must act in good faith. Neither facile excuse nor clever dissimulation can serve in the stead of duty faithfully performed. Because public men and women are amenable "at all times" to the people, they must conduct the public's business out in the open.

Davis v. City of Macon, 262 Ga. 407, 407–08, (1992) (Weltner, J. concurring) (citing GA. CONST. Art. 1, Sec. 2, Para. I (1983)).

Because of this constitutional underpinning, the presumption of access to court records has long existed in Georgia's common law. *Merch. L. Firm, P.C. v. Emerson,* 800 S.E.2d 557, 561 (Ga. 2017) (reconsideration denied) ("The right of access to court records under court rule is coextensive with the common law right of access to court proceedings.") "The aim of this presumption is to ensure that the public will continue to enjoy its traditional right of access to judicial records, except in cases of clear necessity. To this end, the presumptive right of access includes pre-judgment records in civil cases and begins when a judicial document is filed." *Atlanta Journal v. Long*, 258 Ga. 410, 413–14 (1988). This presumption may be overridden only "in cases of clear necessity." *Id.* at 413. The public's ability to access court records is "an essential component of our system of justice" and "is instrumental in securing the integrity of the process." *F.T.C. v. AbbVie Prod. LLC,* 713 F.3d 54, 62 (11th Cir. 2013) (quoting *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1311 (11th Cir.2001) (*per curiam*)). This enduring principle is at its most vulnerable when court records are being sealed, which is

why Georgia courts have robust procedures for ensuring that the public's interest is carefully considered and weighed against any private interest. This constitutional and common law right of access to court records aligns perfectly with the procedural framework of Rule 21.

The Georgia Supreme Court has held that when a lower court "fails to hold a hearing on whether to seal a record or fails to make findings of fact concerning whether the privacy interests at stake outweigh the public's interest in access to records, an order sealing a record *must* be reversed on appeal." *Wall v. Thurman,* 283 Ga. 533, 535 (2008) (emphasis added); *see also BankWest, Inc. v. Oxendine,* 266 Ga. App. 771, 779 (2004). Both reversible errors are present here: no hearing was held and no balancing test was conducted before the seal.

The third prong of the order addresses access to the OSAH hearings. The OSAH ordered that the hearings in these cases must be closed to the public *without any party requesting that it do so*.[4] Remarkably, while the Hope Act does contain some limitations for the dissemination of records under the Open Records Act, it provides no guidance or language relating to closing court proceedings to the public.

Georgia's Uniform Superior Court Rule 22(A) provides:

> Open courtrooms are an indispensable element of an effective and respected judicial system. It is the policy of Georgia's courts to promote access to and understanding of court proceedings not only by the participants in them but also by the general public and by news media who will report on the proceedings to the public.

"[Georgia's Supreme Court] has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open

[4] OSAH has recognized that Georgia's interest in "public trials that are open to the press and public" extends to proceedings before it. *See Ga. Composite Medical Board v. Dodds, M.D.*, OSAH-CSBME-PHY-1444768-33-Malihi (Apr. 30, 2014) (granting CBS News's Rule 43 motion to record and broadcast portions of physician disciplinary hearing not involving patient information); *see also Rowan et al. v. Greene*, 2222582-OSAH-SECSTATE-CE-57-Beaudrot (Apr. 14, 2022) (granting media access to administrative hearings).

courtrooms are a sine qua non of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society." *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982). The Georgia Court of Appeals has similarly expressed that "[p]ublic access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason." *Atlanta Journal v. Long*, 258 Ga. 410, 411 (1988).

Although federal First Amendment precedent upholds the importance of access to court proceedings, "Georgia law . . . is more protective of the concept of open courtrooms than federal law." *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578 (1982). Indeed, "[a] Georgia trial court judge … [has] less discretion than his federal counterpart because our constitution commands that open hearings are the nearly absolute rule and closed hearings are the rarest of exceptions." *Id*. at 579; *see also* Uniform Superior Court Rule 22(A) (recognizing no distinction between criminal and civil court proceedings).

The fact that the press and the public were not given access to the hearings in this matter underscores the need for the record to be unsealed, so that some semblance of transparency can be had in regard to this action.

II. There is No Mechanism to Seal Court Records Within the Hope Act

Contrary to the assertions of those in favor of the seal, there is no language in the Hope Act that contemplates filing court records under seal. O.C.G.A. § 16-12-220(a).

The Hope Act provides, in pertinent part:

> (a) All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part, other than information published in an official commission report regarding the activities conducted pursuant to this article, shall be confidential data and shall not be subject to [the Open Records Act]; provided, however, that any contract,

> memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to this article shall be subject to [the Open Records Act].
>
> (b) In no event shall the commission disclose any information that would reveal the identity or health information of any registered patient or violate [HIPPA].

Ga. Code Ann. § 16-12-220. The language of the Hope Act refers directly to the Open Records Act. *See id*. It does not refer directly to court records or proceedings. *See id*.

That certain information is of a confidential nature and is not subject to the Open Records Act does not mean that there is no interest that would not outweigh that confidentiality, or that there is no context in which the information might become public. *See, e.g.,* Ga. Unif. Super. Ct. R. 21.2 (providing for a balancing test that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest.) It is the nature of court proceedings that confidential information will be used, debated in front of juries, and made public through its use in litigation:

> By their nature, civil lawsuits quite often cause litigants to experience an invasion of privacy and resulting embarrassment, yet that fact alone does not permit trial courts to routinely seal court records. In an order sealing a court record, a trial court must set forth factual findings that explain how a privacy invasion that may be suffered by a party or parties seeking to seal a record differs from the type of privacy invasion that is suffered by all parties in civil suits. Otherwise, the trial court is not justified in closing the record from public scrutiny.

In re Atlanta J.-Const., 271 Ga. 436, 437–38 (1999).

Had the legislature intended to create a process in the Hope Act by which court records could be sealed—it could have easily done so, as it has done many times before. For example, the Taxpayer Protection Against False Claims Act expressly states that complaints "shall be filed in camera and under seal," and "shall remain under seal for at least 60 days." O.C.G.A. § 23-3-122 (b)(2). Likewise, when a record pertaining to the disposition of a child in juvenile court is "filed in a superior or state court or admitted into evidence in a superior or state court proceeding, it shall

be filed under seal." O.C.G.A. § 15-11-703. When a witness testifies before a Grand Jury pursuant to a grant of immunity, the original transcript "shall be filed under seal..." O.C.G.A. § 15-12-83. A reference list that identifies each item of redacted information on a court filing "shall be filed under seal…." O.C.G.A. § 15-10-54 (g). When an individual is convicted of an offense and sentenced as a direct result of the defendant being the victim of an offense of trafficking, the individual may petition to vacate such conviction. O.C.G.A. § 17-10-21(a). Those petitions "shall be filed under seal." O.C.G.A. § 17-10-21(b). Similarly, a petition to examine court records and department records relating to adoption "shall be filed under seal." O.C.G.A. § 19-8-23 (effective July 1, 2022).

In all of the above examples, court record sealing measures were adopted to protect vulnerable witnesses to dangerous crimes, victims of sex trafficking, or minor adoptees. Here, the greatest risk associated with disclosure is potential embarrassment for a government agency or the potential disclosure of trade secret information, which is already protected by another statute. There is no security concern that would merit a blanket seal— and accordingly, the Legislature has intentionally refrained from implementing that advanced level of protection.

That the Legislature intended to grant protection to some of these records in one context does not require the conclusion that the Legislature intended to protect all these records in all contexts. The Hope Act states that "[a]ll working papers, recorded information, documents, and copies *produced by, obtained by, or disclosed to* the commission *pursuant to the activities conducted pursuant to this part*…shall be confidential data…." O.C.G.A. § 16-12-220 (a) (emphasis added). Even if the Legislature had drafted a mechanism into the statute for sealing court records, there would be many documents in the court record that would defy the definition of "confidential information."

For example, during discovery, information might be produced by a third party that was not "produced by, obtained by, or disclosed to" the commission under any of the activities enumerated in O.C.G.A. § 16-12-210. Accordingly, such information would not be confidential. O.C.G.A. § 16-12-220 (a). Pleadings, motions, responses, rulings, judgments, transcripts, and orders are all court records that might not necessarily include the "confidential information" contemplated by O.C.G.A. § 16-12-220 (a); *see also Undisclosed LLC v. State*, 302 Ga. 418, 430–31 (2017) (describing what constitutes a "court record"). And if any court filings might contain the "information published in an official commission report," or "any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission," all of that information is *expressly public* under the Hope Act. *See id*.

To be sure, partial redaction is a more time-consuming approach than sealing the entire record. But it is the best approach to ensure transparency, and it has been fully enforced by Georgia courts. Earlier this year, the Court of Appeals reviewed a similar argument in *Blau v. Georgia Dep't of Corr.,* 364 Ga. App. 1, 6, (2022). In *Blau*, an agency argued that a separate statute preempted access to records under the Open Records Act, mirroring the blanket seal arguments advanced here regarding the Hope Act. *See id*. On the other hand, the requester alleged that the withheld public records did not consist entirely of information covered by the Secrecy Act, and that the records could be produced with redactions. *See id*.

The Georgia Court of Appeals held that "[t]he trial court erred in its construction of the Secrecy Act. Construing the Secrecy Act as creating a blanket exemption from disclosure rather than allowing for redaction is inconsistent with the rule that statutory exemptions to the Open Records Act are to be construed narrowly." *Blau,* 364 Ga. App. at 7. The Court noted that O.C.G.A. § 50-18-72 (b) of the Open Records Act directs that the exemptions set forth in

that statute must be interpreted narrowly to exclude from disclosure *only* that *portion* of a public record to which an exclusion applies.

The Court of Appeals explained that this partial withholding/redaction rule is not limited to exemptions within the Open Records Act, but that it also applies to other statutes that limit access to government records, like the Secrecy Act and here, the Hope Act:

> While this direction is by its terms applicable only to the exemptions listed in O.C.G.A. § 50-18-72, our Supreme Court has reasoned that it would be incongruous were the same standard of narrow construction not applied to exemptions found in other parts of the Code. Consequently, our Supreme Court has concluded that *any* purported statutory exemption from disclosure under the Open Records Act must be narrowly construed.

Blau, 364 Ga. App. at 7-8. (internal citations and quotations omitted). The Court of Appeals, paraphrasing the Supreme Court, noted that "[t]o exclude an entire document because it contains exempted material would be unresponsive to the legislative intent underlying the Open Records Act." *Blau v. Georgia Dep't of Corr.,* 364 Ga. App. 1, 7–8 (2022) (quoting *Hardaway Co. v. Rives,* 262 Ga. 631, 634 (1992)).

There is no language within the Hope Act that expressly contemplates sealing judicial records. And even if there is justification for withholding records that fall within the confidential data definition of the Hope Act, only the information that meets that definition should be withheld. OSAH decided, as a blanket rule, that the mere fact that *some* of its records *might* be exempt under the Open Records Act (a hypothetical question for which it would not have subject matter jurisdiction) was sufficient to bypass the constitutional safeguards that protect the public's access to the courts.

III. Trade Secrets Can Be Protected Without Infringing the Public Interest

If the parties below are attempting to protect commercial trade secrets, the protection of trade secret information falls under a separate statute with its own rigorous standards that should

be applied to each record for which the trade secret protection is being sought. *See* O.C.G.A. § 10–1–761(4); *see also Smith v. Mid–State Nurses,* 403 S.E.2d 789 (Ga. 1991) (holding that commercial information is not a trade secret unless it meets the demanding standards of the Trade Secret Act). The correct approach would be for the parties to identify which of these records would reveal information that would qualify as a trade secret, such that the matter might proceed in conformity with Rule 21. The result of this process would be that a fraction of these records might be sealed or redacted, assuming all other requirements are met.[5] *See* Ga. Unif. Super. Ct. R. 21.1 (stating that the order sealing the records must "specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation."); *see also Atlanta Journal v. Long*, 258 Ga. 410, 414 (1988) (holding that to seal a court document, the moving party must show a prospect of harm that "differs in degree or kind from that of parties in other civil suits.").

But rather than using the preexisting process to protect their trade secret information, instead, several parties to the action below seek to rewrite the Hope Act to include a device for sealing this record in its entirety—which allows them to proceed without conducting any review or analysis of the individual subject records. This maneuver will not suit the decades-long tapestry of jurisprudence in Georgia that leans in favor of keeping court records unsealed.

IV. Significant Public Interest

Medical cannabis laws are of high public interest within this state and across the nation. [6] For the nearly 25,000 healthcare patients already on the state's registry, the performance of the

[5] If it is unclear whether a record is exempt in whole or in part from disclosure by law or privilege, this Court (or the ALJ) may exercise its discretion to order *in camera* review. *See, e.g., St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 746 S.E.2d 98, 108 (Ga. 2013).

[6] Russell, Dale, *Critics question why Georgia Access to Medical Cannabis Commission is exempt from Open Records*, Fox 5 Atlanta, October 7, 2021, available at: https://www.fox5atlanta.com/news/many-question-why-georgia-cannabis-commission-is-exempt-from-open-records.amp (last accessed September 26, 2022).

commission and its contractors is paramount.[7] Georgia taxpayers have a legitimate interest in reviewing state government's stewardship of their money. And for the press to inform the public, it must be afforded access to every court record that is not properly exempt from access.

This significant public interest should be considered before any sealing of these records. "An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest." Rule 21.1-21.2; *see Atlanta Journal v. Long*, 258 Ga. 410, 413 (1988). A deciding court must "weigh the harm to the privacy interest of that party from not sealing the pre-judgment documents against the harm to the public interest from sealing the documents. Before sealing the documents, the court must conclude that the former clearly outweighs the latter." *Id.* at 414 (emphasis added).

Ultimately, the future of medical cannabis and the laws surrounding it rests on the shoulders of Georgia's taxpayers, who, through their duly elected representatives, are the sovereigns of this state. The press must inform them:

> From the free flow of numerous ideas the sovereign ultimately chooses some, eliminates others, and directs the course of the state. Without the free flow of these ideas the state loses direction.
>
> The press plays a peculiar role in this process because it is through the press the ideas are reported to the sovereign. There is no other effective way to report to the sovereign than through the press. If the sovereign was an individual rather than the people collectively, it would be possible to employ special agents to gather ideas and facts from all sources and bring them to the sovereign. Obviously, this cannot be done effectively other than by means of mass communications when the sovereign is the mass of persons called the people. The sovereign has determined it is in the best interest of all that it receive these ideas.

[7] Warren, Ted, *Georgia Board picks 2 companies to sell medical marijuana*, WABE, September 22, 2022, available at: https://www.wabe.org/georgia-board-picks-2-companies-to-sell-medical-marijuana/ (last accessed September 26, 2022).

Vaughn v. State, 381 S.E.2d 30, 32 (Ga. 1989) (Gregory, J., dissenting). The press obtains this information by inspection of court records, such as the ones here. The interest of the press *is* the interest of the public.

It cannot be said that because this case is about the financial or commercial information of private entities, that it is not also of public interest. Through misconduct or alleged misconduct, a private entity can become a legitimate public interest. *See Macon Tel. Pub. Co. v. Tatum,* 436 S.E.2d 655, 657 (Ga. 1993) (holding that a private citizen became "the object of a legitimate public interest" due to her misconduct, such that the newspaper could publish facts about her, including her name).

> The Georgia Constitution guarantees the freedom of the press. A free press is necessary to permit public scrutiny on the conduct of government and to ensure that government operates openly, fairly, and honestly. In first recognizing the right to privacy, this court noted that the right is unquestionably limited by the right to speak and print. For example, we held in *Waters* that the publication of photographs of a murder victim did not violate her mother's right to privacy since, where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy.

Tatum, 436 S.E.2d at 657 (internal citations and quotations omitted). By *voluntarily* applying for and receiving a license to perform a *government function*, these private companies have taken on the corresponding responsibility of a higher standard of scrutiny. Their actions are now of legitimate public interest, especially considering the serious allegations that have emerged relating to their participation in the bidding process. While the movants may have an interest in keeping some information in the record sealed, it is in the best interest of the press—and in the best interest of the entire state—that these court records remain open and available to inspection.

V. Reconciliation of The Hope Act and Rule 21

The approach to sealing the record should begin with *in camera* review of any record that a party considers "confidential data" under the Hope Act, or in the alternative, the party claiming

the designation might provide a privilege log or attestation explaining which records meet the description, and how. *See In re Atlanta J.-Const.,* 271 Ga. 436, 437–38 (1999) (explaining that the party seeking to seal the records carries the burden of proving that the resulting harm clearly outweighs the public's substantial interest in accessing the records).

Then, because the Hope Act does not provide a mechanism for sealing court records, the court would invoke the Rule 21.2 balancing test to determine whether the harm of disclosure of the information, including the confidential data, "clearly outweighs" the public interest. *See* Ga. Unif. Super. Ct. R. 21.2. If there is information in the record that qualifies as "confidential data" under the Hope Act, this fact should tip the scales toward privacy, but only as to those specific records. Documents not entirely comprised of confidential data should be redacted. *See Blau v. Georgia Dep't of Corr.,* 364 Ga. App. 1, 6, (2022).

From that point, the remaining tenets of Rule 21 and its common law counterparts should be followed. The order should specify which parts of the record are sealed, the duration of the seal, and the specific facts which led the Court to conclude that the privacy interest clearly outweighs the public interest. *See In re Atlanta J.-Const.,* 271 Ga. at 438. And of course, before the lower court can sustain the seal, a hearing must be held on the issue. *See id*. "The requirement of a hearing held upon reasonable notice is indispensable to the integrity of the process mandated for limiting access to court records, because "justice faces its greatest threat when courts dispense it secretly." *Id*.

The constitutional nature of the public's right to access court records and proceedings demands that a tribunal exercise thoughtful consideration, even in informal administrative law contexts. This approach places the legislature's special treatment of certain medical cannabis records into the existing framework of the rules and cases governing access, ensuring that

legislative intent is honored while access to court records and proceedings remains as open as possible, in accordance with our constitutional principles.

The Foundation requests that this Honorable Court amend the order of the OSAH to permit access to these records. *See* Ga. Unif. Super. Ct. R. 21.5 (providing that the order may be amended by the appropriate appellate court). In the alternative, the Foundation requests that this Honorable Court remand this matter to the OSAH to amend the order in accordance with Georgia's constitutional transparency principles.

Respectfully submitted this the 27th day of September, 2022.

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Counsel for the Georgia First Amendment Foundation

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:

REVOLUTION GEORGIA LLC,
ASPIRE MEDICAL PARTNERS LLC,
GA BIOSCIENCE RESEARCH INC.,
CURALEAF GA HOLDINGS LLC,
PEACH STATE MEDICINALS LLC,
PURE BEAUTY GA LLC,
CUMBERLAND CURATIVE LLC,
SYMPHONY MEDICAL LLC,
PURE PEACH ORGANIC INC.,
ACC LLC, PEACH HEALTH
ALTERNATIVES LLC,
HARVEST CONNECT LLC,
SILVERLEAF HEALTH ALTERNATIVES
INC., and
REMEDIUM LIFE SCIENCE OF GEORGIA
LLC,

Petitioners,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC;
and TREEVANA REMEDY, INC.,

Respondents.

Case No. 2022CV370799

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Ga. Code Ann. § 50-13-19(b), I served a copy of the Summons and Motion to Unseal filed in this case via mail and electronic mail on this the 5th day of October 2022, upon the following:

Georgia Office of State Administrative Hearings
Attn: Judge Stephanie Howells
225 Peachtree St, Suite 400
Atlanta, GA 30303

/s/ Gerald Weber
Gerald Weber, Georgia Bar No. 744878

TAB 5

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

IN RE: REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Petitioners, v. FFD GEORGIA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC. Respondents.	RFP ID # 11232020 *Petitioner Pure Peach Organic, Inc.*, GMCC-PL-2226125-60-OSAH-Howells Agency Ref.: 2021-PRO-00010 *Petitioner Symphony Medical, LLC,* GMCC-PL-2226124-60-Howells Agency Ref.: 2021-PRO-00009 *Petitioner Pure Peach Organic, Inc.*, GMCC-PL-2226125-60-Howells Agency Ref.: 2021-PRO-00010 *Petitioner Cumberland Curative, LLC,* GMCC-PL-2226123-60-Howells Agency Ref.: 2021-PRO-00008 *Petitioner Aspire Medical Partners, LLC,* GMCC-PL-2226133-60-Howells Agency Ref.: 2021-PRO-00002 *Petitioner ACC, LLC,* GMCC-PL-2226148-60-Howells Agency Ref.: 2021-PRO-00011 *Petitioner Remedium Life Science of Georgia, LLC,* GMCC-PL-2226131-60-Howells Agency Ref.: 2021-PRO-00015 *Petitioner Silverleaf Health Alternatives, Inc.*, GMCC-PL-2226128-60-Howells Agency Ref.: 2021-PRO-00014 *Petitioner GA Bioscience Research, Inc.*, GMCC-PL-2226134-60-Howells Agency Ref.: 2021-PRO-00003 *Petitioner Peach State Medicinals, LLC,* GMCC-PL-2226140-60-Howells Agency Ref.: 2021-PRO-00005 *Petitioner Harvest Connect,* GMCC-PL-2226126-60-Howells Agency Ref.: 2021-PRO-0012

RESPONDENTS' JOINT MOTION TO SEAL

Pursuant to Rule 616-1-2-.16 and O.C.G.A. § 16-12-220, Respondents FFD Georgia Holdings, LLC; Theratrue Georgia, LLC; Natures GA, LLC; and Treevana Remedy, Inc. (together, "Respondents"), hereby move to seal the underlying record in the above-captioned matters in their entirety. The Hope Act, O.C.G.A. § 16-12-220(a), states in pertinent part, "All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part, other than information published in an official commission report regarding the activities conducted pursuant to this article, shall be confidential data and shall not be subject to Article 4 of Chapter 18 of Title 50." Respondents respectfully request that the records be sealed in order to ensure the confidentiality of the parties' documents and data consistent with the requirements of the Hope Act.

A proposed order is attached hereto as Exhibit A.

Respectfully submitted this 6th day of June, 2022.

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Counsel for Treevana Remedy, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed the foregoing **RESPONDENTS' MOTION TO SEAL** with the Office of State Administrative Hearings, which will automatically send e-mail notifications of such filing to all counsel of record.

This 6th day of June, 2022.

/s/ Jacqueline T. Menk
Jacqueline T. Menk

EXHIBIT "A"

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

IN RE: REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Petitioners, v. FFD GEORGIA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC. Respondents.	RFP ID # 11232020 *Petitioner Pure Peach Organic, Inc.,* GMCC-PL-2226125-60-OSAH-Howells Agency Ref.: 2021-PRO-00010 *Petitioner Symphony Medical, LLC,* GMCC-PL-2226124-60-Howells Agency Ref.: 2021-PRO-00009 *Petitioner Pure Peach Organic, Inc.,* GMCC-PL-2226125-60-Howells Agency Ref.: 2021-PRO-00010 *Petitioner Cumberland Curative, LLC,* GMCC-PL-2226123-60-Howells Agency Ref.: 2021-PRO-00008 *Petitioner Aspire Medical Partners, LLC,* GMCC-PL-2226133-60-Howells Agency Ref.: 2021-PRO-00002 *Petitioner ACC, LLC,* GMCC-PL-2226148-60-Howells Agency Ref.: 2021-PRO-00011 *Petitioner Remedium Life Science of Georgia, LLC,* GMCC-PL-2226131-60-Howells Agency Ref.: 2021-PRO-00015 *Petitioner Silverleaf Health Alternatives, Inc.,* GMCC-PL-2226128-60-Howells Agency Ref.: 2021-PRO-00014 *Petitioner GA Bioscience Research, Inc.,* GMCC-PL-2226134-60-Howells Agency Ref.: 2021-PRO-00003 *Petitioner Peach State Medicinals, LLC,* GMCC-PL-2226140-60-Howells Agency Ref.: 2021-PRO-00005 *Petitioner Harvest Connect,* GMCC-PL-2226126-60-Howells Agency Ref.: 2021-PRO-0012

[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION TO SEAL

This case is before this Court on Respondents' Motion to Seal the record in the above-captioned cases. The Court has reviewed Applicant's Motion and hereby GRANTS such motion.

SO ORDERED this _____ day of June, 2022.

_____
Judge Stephanie Howells
Administrative Law Judge
Office of State Administrative Hearings

Order Prepared By:

/s/ Jacqueline T. Menk
Jacqueline T. Menk
Georgia Bar No. 728365

TAB 6

Fulton County Superior Court
EFILEDJH
Date: 11/7/2022 9:29 AM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:

REVOLUTION GEORGIA LLC,
ASPIRE MEDICAL PARTNERS LLC,
GA BIOSCIENCE RESEARCH INC.,
CURALEAF GA HOLDINGS LLC,
PEACH STATE MEDICINALS LLC,
PURE BEAUTY GA LLC,
CUMBERLAND CURATIVE LLC,
SYMPHONY MEDICAL LLC,
PURE PEACH ORGANIC INC.,
ACC LLC, PEACH HEALTH
ALTERNATIVES LLC,
HARVEST CONNECT LLC,
SILVERLEAF HEALTH ALTERNATIVES
INC., and
REMEDIUM LIFE SCIENCE OF GEORGIA
LLC,

Petitioners,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC;
and TREEVANA REMEDY, INC.,

Respondents.

Case No. 2022CV370799

NONPARTY GEORGIA FIRST AMENDMENT FOUNDATION'S REPLY MEMORANDUM TO THE RESPONSE OF CURALEAF GA HOLDINGS LLC, FFD GA HOLDINGS, LLC, THERATRUE GEORGIA, LLC, NATURES GA, LLC, AND TREEVANA REMEDY, INC., IN OPPOSITION TO MOTION TO UNSEAL

The following is the Georgia First Amendment Foundation's reply to both Responses in Opposition to the Foundation's Motion to Unseal in the nature of an appeal.

I. THE FOUNDATION IS AN "AGGRIEVED PARTY" FOR PURPOSES OF THE ADMINISTRATIVE PROCEDURE ACT

The Respondents argue that the Foundation must bring its appeal under the Administrative Procedure Act. Assuming that OSAH has not incorporated Rule 21 in its Rules of Procedure 616-1-2-.02 or 616-1-2-.23, the Foundation still meets the standard of an "aggrieved party" as defined in Ga. Code Ann. § 50-13-19 (a), which provides both jurisdiction and standing.[1]

The Administrative Procedure Act provides that "any person" who is "aggrieved by a final decision in a contested case" is entitled to judicial review. Ga. Code Ann. § 50-13-19 (a). One need not be a party to this dispute to obtain standing under the APA. *See Georgia Power Co. v. Campaign For a Prosperous Georgia,* 255 Ga. 253, 254–56, 336 S.E.2d 790, 792–93 (1985); *see also N. Fulton Med. Ctr., Inc. v. Roach*, 263 Ga. 814, 815, 440 S.E.2d 18, 20 (1994) (explaining that a nonparty may be "aggrieved" and maintain standing for purposes of the APA).

In the context of the Administrative Practice Act, the word "aggrieved" means that the appellant must show that it has an interest in the agency decision that has been specially and adversely affected thereby. *See Georgia Dep't of Cmty. Health v. Northside Hosp., Inc.,* 324 Ga. App. 326, 329–30, 750 S.E.2d 401, 406 (2013), rev'd on other grounds, 295 Ga. 446, 761 S.E.2d 74 (2014), and vacated, 330 Ga. App. 478, 767 S.E.2d 290 (2014) (citing *Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc.,* 191 Ga.App. 42, 43(1)(a), 381 S.E.2d 56 (1989)); *see also Zitrin v. Georgia Composite State Bd. of Med. Examiners*, 288 Ga. App. 295, 299, 653 S.E.2d 758, 763 (2007) (citing *Bd. of Nat. Resources v. Ga. Emission Testing Co.,* 249 Ga.App. 817, 819(1), 548 S.E.2d 141 (2001)). Federal precedent is helpful in filling gaps in Georgia case law to explain what distinguishes a "special" injury from a generalized injury. The United States

[1] The Foundation included the Administrative Procedure Act in its initial filing as a co-existent basis for jurisdiction and venue. *See* Motion to Unseal, paragraph 1.

Court of Appeals for the Seventh Circuit has explained that a citizen has suffered a special injury, as opposed to a general injury, when he has "undertaken a 'special burden' or has otherwise altered his behavior in response to the government action. *See, e.g., Books v. Elkhart Cnty., Ind*., 401 F.3d 857, 861 (7th Cir. 2005). When an organization is forced to alter its behavior or intended strategy, there is a special, distinct injury. *See id*.

The Foundation has suffered such an injury. As a nonprofit devoted to First Amendment principles, the Foundation educates Georgians on their rights to access judicial records. The Foundation produces many manuals for citizens and journalists that explain how to access public records, how to access judicial records, how to access public meetings, how to comply with the state's Sunshine Laws, and how to access public educational records.[2] It is the Foundation's intention, in accordance with its nonprofit mission, to request these judicial records in order to examine the operational transparency of these government-funded activities, which this order prevents. The Foundation now faces a specific and actual hurdle in its mission as an educational nonprofit that it did not face before the entry of this order, and so cannot fulfill its commitment to the public.

In addition to the injury directly suffered by the Foundation itself, its organizational members and board members have also suffered an injury. The Foundation's board is made up of media law attorneys and journalists who intend to request and report on these specific records.[3] Separate from its nonprofit board, the Foundation has organizational members who directly support its First Amendment and public records advocacy. The Foundation's training and events

[2] *See* Georgia First Amendment Foundation's "Resources" webpage, available at: https://gfaf.org/resources/ (last accessed Oct. 12, 2022).
[3] *See* Georgia First Amendment Foundation's "Leadership" webpage, available at: https://gfaf.org/leadership / (last accessed Oct. 17, 2022).

draw large groups of Georgians who are interested in accessing judicial records and public records.

In *Georgia Power Co. v. Campaign for a Prosperous Georgia*, an organization showed that despite its status as a non-party, it was "aggrieved" by an administrative order that would ultimately increase utility rates because the organization's *members* were Georgia Power ratepayers and an increase in one's utility rates was a "special injury." 255 Ga. 253, 258(2), 336 S.E.2d 790 (1985). Similarly, the Foundation's members are primarily journalists and media lawyers who routinely seek access to court records. They are now unable to request these records pursuant to the order of the administrative law judge. *See Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta,* 281 Ga. 342, 344–45, 638 S.E.2d 307, 312 (2006) (explaining that standing in an administrative appeal "does not require a showing that any particular individual member of the Association has already suffered an actual injury," but may be established by a showing of interests or rights which are or will be affected by the action); *see also Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 24–25, 608 S.E.2d 611, 613–14 (2005) (describing the general elements of associational standing).

The sole argument that Respondents offer as to why the Foundation would not be "aggrieved" is because the Foundation has no interest in the outcome of the medical cannabis dispensary licensing protests. *See* Curaleaf Response Brief at 4. This argument would make more sense if the Foundation were challenging the outcome of the medical cannabis dispensary licensing protests. The Foundation is only challenging the order (attached to the initial pleading) that sealed the record. In addition to the Foundation's unique interest as a champion of open government, the First Amendment and the press, the Georgia Supreme Court has declared that *everyone* shares an interest in a transparent judicial process. *See Undisclosed LLC v. State*, 302

Ga. 418, 421-423, 807 S.E.2d 393, 397-398 (2017); *see also Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, No. S22G0039, 2022 WL 14147669, at *16 (Ga. Oct. 25, 2022) (holding that citizens, residents, and taxpayers enjoy standing to enforce public rights).

II. THE RECORDS SOUGHT ARE JUDICIAL RECORDS

Respondents argue that the records sought are not "court" records and therefore, the common law standards of access to court records should not apply. Imagine, for a moment, the far-reaching consequences of holding that an administrative law tribunal is exempt from case law that is applicable to "courts." Under this reasoning, one could argue that the decisions of the Georgia Supreme Court are not binding on an administrative law judge. *See* Ga. Const. art. VI, § 6, ¶ VI ("The decisions of the Supreme Court shall bind all other *courts* as precedents.") (emphasis added); *see also* O.G.C.A. § 50-13-13(7) (providing that failure to comply with a subpoena issued by the administrative law judge shall be cause for punishment as for contempt of *court*) (emphasis added); O.G.C.A. § 50-13-13(9)(b) (providing that the ALJ "shall have the same rights and powers given the *court* under Chapter 11 of Title 9, the "Georgia Civil Practice Act.") (emphasis added); *Georgia Dep't of Hum. Servs. v. Steiner,* 815 S.E.2d 883, 887 (Ga. 2018) (holding that "the superior court erred in reversing the administrative law *court*.") (emphasis added).

Regardless of whether these records were created in a "court," the records are of a judicial nature. An administrative hearing is "judicial" when (1) parties are granted notice and the opportunity to be heard, (2) the hearing officer is required to examine and weigh evidence and to make a decision according to the law, (3) the hearing officer is required to exercise discretion and judgment in application of the law to a particular set of facts, (4) two or more litigants are involved, and (5) the conclusion of the hearing officer is binding. *See Laskar v. Bd.*

of Regents of Univ. Sys. of Georgia, 320 Ga. App. 414, 416–17 (2013) (internal citations and quotations omitted).

As discussed by the respondents, these judicial actions were performed by the administrative law judge in the underlying dispute. The Foundation is appealing a binding order that directly affects its legal rights. It makes no difference whether the judicial process took place at OSAH, this Superior Court, or the Supreme Court of Georgia. The body of case law addressing access to judicial records is not hinged on the technicality of whether the tribunal is a "court." The integrity and transparency of the judicial process must be ensured, regardless of the venue or the setting, because a transparent judicial process is "one of the principal cornerstones of a free society." *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982).

III. ADMINISTRATIVE LAW JUDGES MAY NOT IGNORE GEORGIA CASE LAW WHEN IT DIRECTLY ADDRESSES THE ISSUE BEING DECIDED AND DOES NOT CONFLICT WITH THE APPLICABLE ADMINISTRATIVE RULES

The Licensee Respondents would argue that administrative judges make their decisions in a vacuum of administrative procedural law, completely isolated from the context of Georgia's constitution or common law traditions.

Administrative law judges have great discretion in procedural matters, but they do not possess an unbounded freedom to ignore the precedents of the Georgia Supreme Court, its Court of Appeals, or Uniform Superior Courts, which stress the importance of judicial transparency and the integrity of the judicial process. *See, e.g., Stieberger v. Heckler*, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), *vacated sub nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986) (explaining that administrative law judges must make every reasonable effort to follow the trial or appellate court's views regarding procedural or evidentiary matters when handling similar cases). This is especially true when the applicable administrative rules contain limited guidance for sealing

judicial records. Both the Rules of Administrative Procedure and the Commission's Post-Award Protest procedures provide that a hearing record may be sealed, but neither procedural framework contains thorough guidance for doing so. Even the Rules of Administrative Procedure recognize that additional guidance may be required, which is why they specifically instruct administrative law judges to look to Uniform Superior Court Rules and their precedents when ruling on procedural matters. Administrative Rule of Procedure 616-1-2-.02(3).

While exercising her discretion, the administrative law judge is required to consider applicable Georgia case law and common law principles. Repeatedly, the Georgia Supreme Court has explained that there is no distinction between Rule 21 and the common law: "…the common law is not only part of the relevant legal background regarding the right of access, it is the mold in which Rule 21 was cast." *Undisclosed LLC v. State,* 302 Ga. 418, 421, 807 S.E.2d 393, 396 (2017) (citing to *Merchant,* 301 Ga. at 613 (1) (b), 800 S.E.2d 557). "Through Rule 21," the Supreme Court continued, "the common law remains in effect," and, "[t]here is no indication that Rule 21 changed the common law in any way." *See id*.

For centuries, Georgia case law has provided clear and instructive guidance relating to the importance of judicial transparency. The decisions of the ALJ must conform to this precedent when it is applicable, as is the case here.

IV. THE ALJ ERRED IN ITS INTERPRETATION OF THE HOPE ACT AND THIS COURT IS NOT REQUIRED TO DEFER TO THAT ERROR

The Hope Act provides for the confidentiality of information that is obtained by/produced by/disclosed to (past tense) the Commission "pursuant to the activities conducted pursuant to this part." O.C.G.A. § 16-12-220(a). The "activities" referenced by the Hope Act are limited to the licensing process. *See id*. Reviewing Part 2 of the Hope Act, which discusses the Role of the Commission, there is no reference whatsoever to litigation following the licensing process or

post-award protest procedures. *See* O.C.G.A. § 16-12-210 *et seq.* If the parties submitted *new* arguments, raised for the first time in a judicial process that is outside of and in addition to the licensing process contemplated by the Hope Act—none of those new arguments would qualify under the confidentiality protections of the licensing process, except to the extent that they include the information that was submitted to the Commission earlier, as part of the licensing process. *See id*.

The ALJ held, and the Licensee Respondents argue, that when the Legislature writes "confidential data," what they really intend to say is that all judicial records relating to medical cannabis licensing must be sealed in their entirety, and therefore *Blau's* helpful discussion of redaction is inapplicable. *See Blau v. Georgia Dep't of Corr.*, 364 Ga. App. 1, 7-8 (2022) (explaining the importance of redaction for documents that may contain both public and private information). No respondent has offered a legal citation in support of this statutory interpretation. Reading the term "confidential data" in the full statutory context, one could argue that the Legislature simply meant that the information would be confidential for purposes of the Open Records Act. *See* O.C.G.A. § 16-12-220(a) ("…shall be confidential data and shall not be subject to [the Open Records Act]"). "Confidential data" is not a legal operative phrase for the proposition that the information must forever be always secret, in all times, all places, and all spaces. Without question, the Legislature has exempted much of this information from public view by making it unattainable under the Open Records Act. But a different standard applies to judicial records.[4]

Respondents ask this Court to take their word that the entire administrative hearing record consists of nothing more than the exact documents that are made confidential by the Hope

[4] Again, the Open Records Act does not apply to judicial agencies or to judicial records. *See Fathers Are Parents Too Inc. v. Hunstein,* 202 Ga. App. 716 (1992).

Act, but there's no evidence this is the case. It defies reason to believe that the litigants provided raw business data to the hearing officer without argument or allegation. The Post-Award procedures provide that the litigants may submit "briefs, documents, and witness testimony in the form of affidavits." Curaleaf Ex. A at 7. These records would not qualify as "confidential" under the Hope Act's definition of the term. *See* Ga. Code Ann. § 16-12-220(a). Similarly, Curaleaf argues that redaction is inappropriate because the Hope Act exempts entire "documents." However, the Hope Act also exempts "recorded information," which could easily be included in a document that is otherwise public. *See* O.C.G.A. § 16-12-220(a). This is why redaction of the record is required, as opposed to a blanket seal.

Next, the Licensee Respondents attempt to use the Hope Act to argue that the Hearing Officer should not have engaged in the lengthy process of ensuring judicial transparency because the Hope Act states that "[t]he commission shall not promulgate any rules or regulations that would unduly burden access to low THC oil or products by registered patients." O.C.G.A. § 16-12-210(b). First, there's no evidence that a partial seal would "unduly burden" public access to medical cannabis. Second, Respondent's reliance on this provision is misplaced, as this provision governs the actions of the Commission in regard to the licensing process. The provision does not govern the ALJ, who was acting in her capacity as a judicial officer reviewing a legal dispute subsequent to, and distinct from, the licensing process.

The Licensee Respondents argue that "great deference" must be afforded to the ALJ's erroneous interpretation of the Hope Act. Licensee Respondent's Response at 10. But "[w]hile judicial deference is afforded an agency's interpretation of statutes it is charged with enforcing or administering, the agency's interpretation is not binding on the courts, which have the ultimate authority to construe statutes." *Eagle W., LLC v. Georgia Dep't of Transp.,* 312 Ga. App. 882,

885–86, 720 S.E.2d 317, 321 (2011). "It is the role of the judicial branch to interpret the statutes enacted by the legislative branch and enforced by the executive branch, and administrative rulings will be adopted only when they conform to the meaning which the court deems should properly be given." *Id*. This Court is under no obligation to adopt the ALJ's interpretation of the Hope Act.

This is especially true when the interpretation was plainly erroneous. When interpreting statutes, we look to the plain language. *See Deal v. Coleman,* 294 Ga. 170,173 (2013) ("…if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end."). The Hope Act is problematic for open government advocates in many aspects, and yet it does not provide blanket confidentiality. Respondents lobbied for complete secrecy, [5] but they are now bound by the plain language of the statute. A seal for judicial records is not expressly mandated by the Hope Act, nor is it implied by necessity. And in the absence of express language providing for a mandated seal, Georgia's case law provides comprehensive, on-point guidance for the factors to be considered before the public right of access can be revoked.

V. THE BUSINESS INTEREST OF CURALEAF DOES NOT OUTWEIGH THE PUBLIC'S INTEREST IN THE PERFORMANCE OF ITS GOVERNMENT

Respondents argue that "the business interests in maintaining the seal on the ALJ hearing records as to parties not a part of the protest and licensing proceedings outweighs any potential interest of the general public in unsealing the documents."

These private parties chose to engage in this government process. They chose to compete to contract for a government function in pursuit of immense profit. And although there are rules

[5] Niesse, Mark, *Medical Marijuana Companies Influenced Passage of Georgia Law*, Atlanta-Journal Constitution, available at https://www.ajc.com/news/state--regional-govt--politics/medical-marijuana-companies-influenced-passage-georgia-law/3VO8pNHguFw1eRs7JB1nOP/ (last visited November 2, 2022).

in place to protect Respondents' trade secret information, we have yet to hear any argument as to (1) what information they actually submitted and (2) how that information meets the definition of a "trade secret." A conclusory statement that the records are trade secret will not suffice. *See, e.g., State Rd. & Tollway Auth. v. Elec. Transaction Consultants Corp.*, 306 Ga. App. 487, 490 (2010) ("The conclusory statement…that the method by which it allocates costs and pricing for the services it provides is unique, provides no specific basis to evaluate its claims…On this record, Electronic failed to support its contention that its detailed price proposal contains its trade secrets."). Respondents have not made the effort to name a single document or even a vague category of information submitted to OSAH that they consider to be a protectable trade secret.

The unsealing process proposed by the Foundation includes *in camera* review and thorough legal analysis that would protect trade secret information. It would also observe the limitations of the Hope Act. But it is certain that *some* information was submitted during the hearing that would not be eligible for either protection. Georgia case law is full of examples of commercial information that does not constitute trade secret information because of how it is stored and treated by a party, its content, or a variety of other factors.[6]

Contrary to Respondents' assertions, public interest is appropriate at this stage in the process. The public has a right to know why some bidders were overlooked and whether the successful bidders are qualified to fulfill the government contract they were recently awarded. The government performance in this case is not just the performance of successful bidders in their contract duties, but also the performance of the Commission in awarding the contracts solely on merit and the integrity of the judicial process that followed the award. How the

[6] *See, e.g., Capital Asset Research Corp. v. Finnegan*, 160 F.3d 683 (1998) (a process for evaluating an amount to be bid on a tax deed was not a trade secret); *Allen v. Hub Cap Heaven, Inc.*, 225 Ga.App. 533 (1997), reconsideration denied ("secret" sales technique was not a trade secret); *Sutter Capital Management, LLC v. Wells Capital, Inc.*, 310 Ga. App. 831 (2011) (lists of investors were not trade secrets); *Avnet, Inc. v. Wyle Lab'ys, Inc.*, 263 Ga. 615, 619, 437 S.E.2d 302, 305 (1993) (customer lists are not trade secret unless specific elements are met).

government selects its vendors, what influences may be affecting the awards of millions of dollars' worth of contracts, whether the elected and appointed public officials are carrying out their duties appropriately, and above all, the judicial process determining the rights of the parties—every citizen in Georgia has an overwhelming interest in the integrity of these activities.

VI. CONCLUSION

We respectfully ask this Honorable Court to amend the order of the OSAH to permit access to these records. As part of this process, we ask this Honorable Court (1) to order *in camera* review of the hearing record, (2) to order the objecting parties to submit evidence and argument addressing the specific portions of the record that they deem to be a trade secret and/or exempt under the Hope Act, and (3) provide the Foundation with the opportunity to address that evidence and argument in a hearing.

In the alternative, the Foundation requests that this Honorable Court remand this matter to the OSAH to amend the order in accordance with constitutional transparency principles.

Respectfully submitted this the 7th day of November, 2022.

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Petitioners, v. FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Respondents.	Case No. 2022CV370399

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Ga. Code Ann. § 5-6-32, I served a copy of the foregoing via mail on this the 7th day of November 2022 upon the Court and upon the following:

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TAB 7

SAME RESULT AS RULE 21.

SO, WITH THAT, I'M GOING TO SHARE MY SCREEN, IF THAT'S OKAY.

THE COURT: OKAY.

MS. RAMSINGH: AND WE'LL GO STRAIGHT INTO THIS.

LET ME SEE IF I CAN ENLARGE THIS.

OKAY. SO, SKIPPING THROUGH ALL OF THE CONSTITUTIONAL LAW, I WANT TO GO STRAIGHT TO THE POSTER BOARD PROTEST PROCEDURES, 3.2.

NOW, THIS WAS PROVIDED AS EXHIBIT A TO CHARLEY'S (PHONETIC) RESPONSE TO BRIEF. I'VE QUOTED IT HERE, IN PART, BUT YOUR HONOR CAN READ THE ENTIRE THING, AGAIN, EXHIBIT A TO CHARLEY'S RESPONSIVE BRIEF.

NOW, ALL OF THE PARTIES CITED TO RULE 3.3, WHICH BASICALLY SAYS, THE HEARING OFFICER CAN SEAL THE RECORD BEFORE THE PARTIES CAN REQUEST IT. NONE OF THEM CITED THE 3.2, WHICH IS THE RULE THAT COMES DIRECTLY BEFORE 3.3. WE KNOW THAT IT ADDRESSES PREHEARING CONFIDENTIALITY. THE TITLE OF THE RULE IS "PREHEARING STATUS CONFERENCE SLASH CONFIDENTIALITY."

AND HERE'S WHAT THE RULES SAYS: IT SAYS: (READING) PRIOR TO THE HEARING, A HEARING OFFICER

MAY IN HIS OR HER SOLE DISCRETION -- I'LL COME BACK TO THAT IN JUST A MOMENT -- AND THEN WE HAVE A TWO-STEP PROCESS.

SHE CAN, ONE, REVIEW ANY CONFIDENTIAL CANNABIS COMMISSOIN DATA IN CAMERA AND -- THAT'S WHY I SAID IT'S A TWO-STEP PROCESS -- WE HAVE AND, NOT OR -- AND ENTER A PROTECTIVE ORDER OR ANY OTHER APPROPRIATE ORDER -- HERE'S THE LIMITING LANGUAGE -- NECESSARY TO MAINTAIN THE CONFIDENTIALITY OF CANNIBIS COMMISSION DATA AS REQUIRED UNDER -- AND THEN SHE SITES TO THE EXACT -- OF THE HOPE ACT THAT WE'RE TALKING ABOUT TODAY.

THE COURT: RIGHT. LET ME INTERRUPT YOU FOR ONE SECOND, THOUGH, MS. RAMSINGH.

MS. RAMSINGH: YES, YOUR HONOR.

THE COURT: BECAUSE -- SO, O.C.G.A. 16-12-220 APPLIES GENERALLY. CERTAINLY, THE OPEN RECORDS ACT APPLIES GENERALLY. CERTAINLY THE PROCEDURAL RULES REGARDING RULE 22 AND OTHER ACTS AS TO OPEN COURT RECORDS APPLIES GENERALLY.

BUT THE POST-AWARD PROTEST PROCEDURES, AREN'T THEY INTENDED TO APPLY TO THE PARTIES INVOLVED IN THE -- IN THE PROTEST PROCEDURE AND NOT NECESSARILY TO AN INTERESTED THIRD PARTY, SUCH AS YOURSELF?

MS. RAMSINGH: WELL, YOUR HONOR, I BELIEVE UNDER THE ADMINISTRATIVE PROCEDURE ACT, WHICH NO PARTY IN THIS MOTION -- I HEARD THE ARGUMENTS EARLIER ABOUT WHETHER THE APA APPLIES. BUT UNDER THE ADMINISTRATIVE PROCEDURE ACT, ANY AGGRIEVED PARTY CAN APPEAL AND PURELY RECOGNIZE OUR RIGHT TO APPEAL UNDER THE APA IN THEIR BRIEF, AND THE OTHER LICENSEE RESPONDENTS CAN ADDRESS IT.

THEY SAID, WELL, WE CAN'T BRING THIS UNDER RULE 21. BUT I HAVEN'T FOUND ANYTHING IN THE BRIEFS, AT LEAST IN THIS MOTION BEFORE YOUR HONOR, THAT WOULD SAY THAT WE CAN'T BRING IT UNDER THE APA AS AN GRIEVED PARTY.

SO, WE DID PLEAD THAT, AS WELL AS RULE 21. IN PARAGRAPH 1 OF OUR MOTION TO UNSEAL, WE REFERENCED THAT SECTION, 50 -- LET'S SEE, IT'S 50-13-19 THAT WE REFERENCED TO THAT. IN OUR REPLY, I FULLY BRIEFED OUT THAT WE ARE AN AGGRIEVED PARTY UNDER THE APA.

SO, THIS PROCEDURE GOES TO SEALING THE RECORD.

THE -- IF YOU READ THE RULES TOGETHER, YOU KNOW, RULE 3.3 SAYS YOU CAN SEAL THE RECORD, OBVIOUSLY TO THE EXTENT THAT IT IS CONFIDENTIAL, AFTER YOU'VE FIRST UNDERGONE THIS TWO-STEP PROCESS

THAT THE ADMINISTRATIVE LAW JUDGE BIFURCATED.

SO, WHAT HAPPENED WAS, IF YOU LOOK AT HER ORDER, AND THE TIMING OF HER ORDER, SHE ENTERED THIS ORDER PRIOR TO THE HEARING. IT IS A PROTECTIVE ORDER. IT DOES REFERENCE 16-12-220(A), BUT THE PROBLEM IS THAT SHE FAILED TO CONDUCT AN IN CAMERA REVIEW.

NOW, SHE MAY HAVE CONDUCTED ANOTHER IN CAMERA REVIEW FOR A DIFFERENT PURPOSE. FOR EXAMPLE, RULE 2.3 TALKS ABOUT THE EXCHANGE OF INFORMATION JUST BETWEEN THE LITIGANTS.

THERE'S A WHOLE SEPARATE RULE FOR THAT THAT TALKS ABOUT -- OKAY, BEFORE WE EXCHANGE INFORMATION WITH EACH OTHER AS THE APPLICANTS, THE DENIED APPLICANTS, WHATEVER, WE'RE GOING TO GO THROUGH A DIFFERENT IN CAMERA.

BUT THIS RULE IS SPECIFICALLY FOR THE HEARING.

AND WHAT -- THE MAIN THRUST THAT I WANT TO KIND OF GET ACROSS TODAY IS THAT THIS RULE -- FIRST OF ALL, IT SIGNALS THE COMMISSION'S INTERPRETATION OF THE HEALTH ACT. IT SIGNALS THAT THE COMMISSION UNDERSTANDS THAT NOT EVERYTHING THAT GOES IN THE HEARING RECORD, LIKE, FOR EXAMPLE, THE SCHEDULING ORDERS OF THE

ADMINISTRATIVE LAW JUDGE OR, YOU KNOW, PROCEDURAL MOTIONS AND RESPONSES OR ENTRIES OF APPEARANCE OR OTHER THINGS LIKE THAT, IT SIGNALS THAT THE COMMISSION UNDERSTANDS THAT THERE IS A DIFFERENCE BETWEEN CANNABIS COMMISSION DATA AND THE CONFIDENTIAL DATA AND THAT ROUTINE JUDICIAL PROCESS INFORMATION THAT WOULD BE IN ANY JUDICIAL -- IN ANY HEARING OF A JUDICIAL NATURE THAT WOULD BE IN THE RECORD.

AND I WANT TO MOVE ON, NOW, TO TALK ABOUT, A LITTLE BIT ABOUT THE HOPE ACT. WE CAN STOP HERE BECAUSE IF YOUR HONOR FINDS THAT SHE FAILED TO -- THAT IF SHE ERRED BY BIFURCATING THIS TWO-STEP PROCESS -- SEE, SHE HAS THE DISCRETION, RIGHT, TO DO THIS OR NOT DO IT. BUT SHE DOESN'T HAVE DISCRETION TO SPLIT THAT END.

IF HE'S GOING TO ENTER A PROTECTIVE ORDER, THEN SHE MUST FIRST REVIEW THE DATA IN CAMERA, WHICH IS -- SHE JUST ENTERED A BLANKET SEAL. IT WASN'T NECESSARY TO MAINTAIN THE CONFIDENTIALITY OF THE DATA, AND IT WASN'T PRECEDED BY AN IN CAMERA REVIEW.

SO, WE CAN STOP THERE AND GET TO THE RELIEF THAT WE WANT, IF YOUR HONOR WILL REMAND THIS FOR HER TO GO THROUGH THAT PROCESS.

TAB 8

Fulton County Superior Court
EFILEDAC
Date: 2/9/2023 11:05 AM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Petitioners, v. FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Respondents.	CIVIL ACTION NO. 2022CV370799 **JUDGE RACHEL R. KRAUSE**

FINAL ORDER DENYING MOTION TO UNSEAL

This case is before the Court on the Motion of Non-Party Georgia First Amendment Foundation (GFAF), seeking to overturn an Order Granting Motion to Seal, entered on June 23, 2022, by Stephanie Howells, an Administrative Law Judge, sitting as a hearing officer on behalf of the Georgia Access to Medical Cannabis Commission.

The underlying proceedings involve bid protests by unsuccessful applicants. The Order at issue in this appeal provided that "documents submitted or filed, any transcripts, or recordings are not subject to the Georgia Open Records Act" and "will not be publicly disclosed." Order, p. 5. The Order further provided all hearings on the protest matters would be closed to the public. *Id*. In sealing the proceedings, the Commission, through its hearing officer, relied upon O.C.G.A. § 16-12-220, which provides that "[a]ll working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part," unless it is published by the Commission, "shall be confidential data and shall not be subject to" Georgia's Open Records Act (O.C.G.A. § 50-18-71, *et seq.*)

In this action, GFAF alleges that the order violates the public's constitutional right of access.[1] Having considered the briefing and argument by GFAF and the parties to the underlying bid protests, the Court is not persuaded that these proceedings should be unsealed. The plain language of O.C.G.A. § 16-12-220 provides that the Georgia Open Records Act is not applicable. Rule 21 of the Uniform Superior Court Rules does not apply because the bid protests are neither

[1] Although GFAF made general constitutional arguments, it did not assert in its briefing or argument that the statute on which the hearing officer relied in sealing the record (O.C.G.A. § 16-12-220) was, in itself, unconstitutional.

pending in Superior Court nor are they "court records" within the meaning of that rule. *See Undisclosed LLC v. State*, 302 Ga. 418 (2017).

Similarly, Georgia's Administrative Rules of Procedure do not seem to squarely apply to this bid protest, but even if they did, those rules do not require public disclosure. Section 606-1-2-.23 provides that the record of administrative proceedings may be deemed unavailable to the public when, as here, there is a "law according confidentiality." GFAF's reliance on confidentiality provisions in the bid protest rules (Sections 2.3 and 3.2) is similarly misplaced because those rules do not apply to the public or the media, but rather to "interested applicants," defined by those rules to mean "an actual or prospective applicant with a direct economic interest in the procurement of a Class 1 or Class 2 production license." *Section 1.2, Cannabis Commission Post-Award Protest Procedure*.

Because GFAF is not a party to these confidential proceedings and no law or rule requires disclosure to non-parties, GFAF's Motion to Unseal is hereby DENIED.

IT IS SO ORDERED, this 9th day of February 2023.

The Honorable Rachel Krause
Fulton County Superior Court
Atlanta Judicial Circuit

Filed and served via eFileGA.

TAB 9

IN THE COURT OF APPEALS
STATE OF GEORGIA

GEORGIA FIRST AMENDMENT FOUNDATION, Appellant, v. REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Plaintiff-Respondents, and FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Defendant-Respondents.	Application No. _____ Fulton Co. Superior Court Civil Action File No. 2022 CV 370799

THE GEORGIA FIRST AMENDMENT FOUNDATION'S
APPLICATION FOR LEAVE TO APPEAL

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I. INTRODUCTION

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *See. Newspapers Corp. v. State,* 454 S.E.2d 452, 456 (Ga. 1995) (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 572 (1980)). This is especially true when the issue sits at the intersection of public health, government regulation and public money. In this matter, a heavily regulated substance is being lawfully produced in Georgia for the first time; the licensure of health care providers is being contested amid serious allegations of wrongdoing; and the allocation of billions of taxpayer dollars hinge on the outcome. The Georgia First Amendment Foundation requests that this Honorable Court accept this appeal to determine, as an issue of first impression, whether Georgia law mandates a blanket seal for any and all medical cannabis judicial records.

Three years ago, the Georgia legislature decided that its constituency would benefit from access to medical cannabis. It passed the Hope Act of 2019, O.C.G.A. § 16-12-9, that created the Georgia Medical Access to Cannabis Commission and provided for the licensure of private businesses to produce and distribute the product. Companies quickly queued up to apply for licenses, which is not surprising, considering that the global cannabis industry surpassed $25.7 billion in

2021 and is expected to reach $148.9 billion within the next ten years.[1] After the Cannabis Commission rendered its initial licensing decisions, several bidders appealed through a post-award protest procedure developed by the Commission. The outcome was intensely contested by the businesses that lost the opportunity to pioneer medical cannabis production in a newly opened territory, where competition is nonexistent.

The licensing appeals were heard by a designated administrative law judge from the Office of State Administrative Hearings. The hearing was decidedly judicial in nature, with all parties having the opportunity to submit testimony, evidence, and argument, and the administrative law judge ("ALJ") issuing a binding opinion as to the parties' legal rights and obligations. While these hearings were pending, the Foundation learned of a pending motion to seal the hearing record before the ALJ. The Foundation filed a motion seeking leave to submit an attached amicus brief in opposition to sealing. The Foundation later became aware that the ALJ had already sealed the record and the proceedings in their entirety, without a hearing. In so doing, the ALJ relied on the Hope Act, which contains no mention of judicial records or access to them.

[1] Globe Newswire, *Global Cannabis Market to Reach $148.9 Billion by 2031: Allied Market Research*, Sept. 7, 2022, available at: https://www.globenewswire.com/news-release/2022/09/07/2511824/0/en/Global-Cannabis-Market-to-Reach-148-9-Billion-by-2031-Allied-Market-Research.html (last accessed Mar. 3, 2023).

The ALJ never issued an order, response to, or acknowledgement of the Foundation's Motion for Leave to File Amicus support, leaving the Foundation in the dark as to the status of the Motion to Seal and the order sealing the record—which was also issued under seal. When the Foundation finally learned that the ALJ had issued an order sealing the record before the Foundation had filed its motion, the Foundation appealed immediately to the Fulton County Superior Court.

While every state recognizes the people's right to access judicial records, Georgia's jurists have been uniquely fervent in their longstanding defense of this common law right, which stems from the Georgia Supreme Court's broader interpretation of the Georgia Constitution's open courts protections. Although the Hope Act exempts Cannabis Commission records from public disclosure under the Georgia Open Records Act, the Hope Act does not address access to records of a judicial nature, nor does it provide a procedural process for sealing judicial records. The Post-Award Protest Procedures developed specifically by the Commission contemplate that the record will be open to the public and provide for a strict *in camera* review process prior to sealing, which the ALJ failed to follow.

After a hearing on the Foundation's appeal, the Superior Court upheld the ALJ's sealing order. The Superior Court erred:

- by failing to focus its review on the constitutional underpinnings of the public right to access judicial records;
- in its interpretation of the Hope Act;
- by holding that the Foundation does not have standing to bring this claim under the Administrative Procedure Act ("APA");
- by holding that the Foundation does not have standing to bring this claim under the common law;
- by upholding the decision of the ALJ, when the ALJ failed to follow the bid protest rules developed by the Commission;
- by finding that the bid protest rules do not permit the public to challenge a limitation to access placed on judicial records;
- by holding that the Administrative Rules of Procedure did not apply in the administrative hearing; and
- by holding that Administrative Rules of Procedure would permit a blanket seal over these judicial records.

The Foundation brings this appeal in the hope that this Honorable Court in its ultimate ruling will reverse these errors, create new precedent interpreting the confidentiality provisions of this new law, and affirm Georgian citizens' right to access judicial records.

I. STATEMENT OF THE CASE

a. Georgia First Amendment Foundation

The Foundation is a nonpartisan, nonprofit organization that advocates for the rights of citizens, journalists, and public servants to gather information about the operation and performance of government institutions. It is a member of the National Freedom of Information Coalition and is the only nonprofit organization in the state of Georgia dedicated to advancing access to public information. Its members and leadership include Georgia's journalists, media organizations, attorneys, public employees, and citizens.

For almost thirty years, the Foundation has educated Georgians on their right to access judicial records. The Foundation publishes guidance manuals that explain how Georgians may access public records, judicial records and public meetings and how government officials may comply with the state's Sunshine Laws. The Foundation's board of directors, organizational members and supporters include journalists who intend to request and report on information contained in public and judicial records, media law attorneys who specialize in public access to such records in our state, and Georgia citizens who request public and judicial records to learn more about the workings of their government and to advocate for good governance. Trainings and events hosted by the Foundation draw the attention and

attendance of hundreds of Georgians who are interested in accessing public and judicial records.

b. Respondents

When the Foundation initially moved for leave to file an amicus brief in the administrative proceeding, it named all eighteen medical cannabis licensee applicants whose records were included under the ALJ's sealing order. Of these, only five companies responded to the appeal filed by the Foundation in the Superior Court: Curaleaf GA Holdings, LLC, FFD GA Holdings, LLC, TheraTrue Georgia, LLC, Natures GA, LLC, and Treevana Remedy, Inc. (collectively, the "Licensee Respondents").

c. Georgia Access to Medical Cannabis Commission

The Georgia Access to Medical Cannabis Commission is an administrative agency created by the Hope Act. *See* O.C.G.A. § 16-12-202; *see also* O.C.G.A. § 50-13-2 (1) (defining an "agency" for purposes of the Administrative Procedure Act as a state commission authorized by law expressly to make rules and regulations); O.C.G.A. §16-12-203 (15) (expressly authorizing the Commission to make rules and regulations). The Commission was served with notice of all the proceedings to date involving the Foundation but has not elected to intervene.

d. Administrative Court Proceedings

On June 6, 2022, as licensing protests were pending in the Administrative Court under Case No. 2226123-OSAH-GMCC-PL-60-Howells, certain medical cannabis companies filed a motion to seal the hearing record. The Foundation's understanding was that a hearing on this motion would occur on July 12, 2022. On July 8, 2022, the Foundation sought leave to file an attached amicus brief supporting the opponents to the sealing request.

No ruling ever issued from the Administrative Court as to the Foundation's Motion for Leave to File Amicus. In the meantime, the Foundation learned that on June 23, 2022, without holding a public hearing, the ALJ had sealed not only the protests hearing record, but all of the administrative proceedings in their entirety. Ironically, the pleadings and orders that would have informed the Foundation of this fact were filed under seal.

Once the Foundation became aware that a blanket sealing order had been issued without a public hearing, the Foundation filed a Motion to Unseal in the nature of an appeal in the Superior Court of Fulton County.

e. Superior Court Proceedings

On September 28, 2022, the Foundation filed a Motion to Unseal in the nature of an appeal in the Superior Court of Fulton County, as an aggrieved party under the Georgia Administrative Procedure Act. Four Licensee Respondents responded to the action, and briefs were filed. On January 6, 2023, the Superior

Court heard oral argument on the issue of whether the records should remain sealed. On February 9, 2023, the Superior Court issued a Final Order, denying the Foundation's motion and affirming the blanket seal.

II. ORDER BEING APPEALED

The Superior Court ruled that the Foundation and the people of Georgia have no ability to access these judicial records. *See* Tab 1. Unlike most sealing orders, which are limited in some form (e.g., nature, time, scope), the ALJ's sealing order creates a permanent blanket seal over, not only material that would be traditionally protected from public view such as trade secrets, but also the parties' legal arguments, scheduling orders, prehearing orders, and other routine judicial documents. The Foundation now seeks to appeal from the Superior Court's February 9, 2023, final decision upholding the ALJ's sealing order.

III. JURISDICTION

a. This matter falls within the general appellate jurisdiction of this Honorable Court

The Georgia Supreme Court does not have exclusive jurisdiction over the matters involved in this case, nor is jurisdiction conferred on another court by law. As such, this Honorable Court may exercise its general appellate jurisdiction to hear this matter. GA. CONST. art. VI, § 5, ¶ 3 (granting the Court of Appeals broad appellate jurisdiction over "all cases not reserved to the Supreme Court or conferred on other courts by law"); *see also* GA. CONST. art. VI, § 6, ¶ 2

(providing an enumeration of appellate cases exclusively reserved for the Supreme Court).

The Administrative Procedure Act further provides that "[a]n aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law." O.C.G.A. § 50-13-20.

b. This Honorable Court has jurisdiction over the constitutional issues in this appeal

This case involves arguments relating to the right to access judicial records, which is a constitutional issue that has been comprehensively and repeatedly addressed by the Georgia Supreme Court. *See Merch. L. Firm, P.C. v. Emerson,* 800 S.E.2d 557, 561 (Ga. 2017) (addressing the common law right of access to judicial proceedings); *see also Atlanta Journal v. Long*, 258 Ga. 410, 413–14 (1988) (discussing the traditional right of access to judicial records).

The issue of whether the lower courts followed the existing constitutional guidance of the Supreme Court is within this Honorable Court's jurisdiction. GA. CONST. art. VI, § 6, ¶ 2 (providing that the Georgia Supreme Court has exclusive appellate jurisdiction over cases involving the construction of the Georgia Constitution, as well as any case involving the constitutionality of a law); *but see also Williams v. State*, 546 S.E.2d 522, 523 (Ga. 2001) (providing that the Court of Appeals has jurisdiction over appeals involving constitutional issues when the

issue in question has already been decided by the Supreme Court); *R. W. Page Corp. v. Lumpkin,* 292 S.E.2d 815, 819 (Ga. 1982).

c. The order of the Superior Court is a final, appealable order

The order from the Superior Court upheld the order of the administrative law judge acting on behalf of an administrative agency and denied the Foundation's motion to unseal the judicial records. The order fully disposed of the substantive issue of whether the judicial records could be accessed by the Foundation. As such, it is an appealable order. *See Yanes v. Escobar,* 362 Ga. App. 896, 897, 870 S.E.2d 506, 507 (2022) (internal citations omitted) ("Generally, an order is final and appealable when it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court.").

IV. ENUMERATION OF ERRORS

a. The Superior Court erred by failing to focus its review on the constitutional nature of the public's right to access judicial records

The United States Supreme Court has observed that the concept of open judicial proceedings and records "was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights." *Gannett Co. v. DePasquale*, 443 U.S. 368, 421–22 (1979).

> For example, during the century preceding the English Civil War, the defendant was kept in secret confinement and could not prepare a defense.

> He was not provided with counsel either before or at the trial. He was given no prior notice of the charge or evidence against him. He probably could not call witnesses on his behalf. Even if he could, he had no means to procure their attendance. Witnesses were not necessarily confronted with the prisoner. Document originals were not required to be produced. There were no rules of evidence. The confessions of accomplices were admitted against each other and regarded as specially cogent evidence. And the defendant was compelled to submit to examination.
>
> Yet the trial itself, without exception, was public.

Id. (citing to J. Stephen, A History of the Criminal Law of England 350 (1883)) (emphasis added). The Supreme Court went on to observe that legal scholars and jurists have repeatedly "recognized publicity as an essential of trial at common law," as "an effective check on judicial abuse, since publicity made it certain that if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers." *Id*. (internal citations and quotations omitted) (emphasis in original).

The Star Chamber is often cited as a warning against litigation secrecy, as many of its gruesome practices resulted from the fact that witness testimony was taken in secret, by a court examiner. *See In re Oliver,* 333 U.S. 257, 271 (1948) n. 22. That said, while the witness testimony was taken in secret, even the Star Chamber, perhaps the most infamous court in English history, did not permit litigation proceedings to be closed to the public. *See Gannett Co. v. DePasquale,* 443 U.S. 368, 420, 99 S. Ct. 2898, 2926, 61 L. Ed. 2d 608 (1979) ("Indeed, there is little record, if any, of secret proceedings, criminal or civil, having occurred at any

time in known English history. Apparently, not even the Court of Star Chamber, the name of which has been linked with secrecy, conducted hearings in private.")

Georgia, in particular, has always taken a strong stance against secrecy in judicial proceedings:

> In the State of Georgia, the public and the press have traditionally enjoyed a right of access to court records. Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason. Like a candle, court records hidden under a bushel make scant contribution to their purpose.

Atlanta J. v. Long, 369 S.E.2d 755, 757 (Ga. 1988), *opinion corrected,* 377 S.E.2d 150 (Ga. 1989). The common law right of access that the Georgia Supreme Court refers to in the above quotation originates from Georgia's Constitution, which provides that "[p]ublic officers are the trustees and servants of the people and are at all times amenable to them." GA. CONST. Art. 1, Sec. 2, Para. I (1983)). As the late Chief Justice Charles L. Weltner wrote:

> [O]ur court has breathed life into some old words that have lain dormant within our Constitution for most of their century old existence. The words are: "Public officers are the trustees and servants of the people and are at all times amenable to them." We have established that this is no empty phrase, but an obligation that is enforceable in a court of law. Public men and women, above all others, must act in good faith. Neither facile excuse nor clever dissimulation can serve in the stead of duty faithfully performed. Because public men and women are amenable "at all times" to the people, they must conduct the public's business out in the open.

Davis v. City of Macon, 262 Ga. 407, 407–08, (1992) (Weltner, J. concurring) (citing GA. CONST. Art. 1, Sec. 2, Para. I (1983)). The integrity and transparency

of the judicial process must be ensured, regardless of the venue or the setting, because a transparent judicial process is "one of the principal cornerstones of a free society." *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982).

In light of this history and precedent, to say that the right to access judicial records and proceedings is fundamental to our principles of justice is a vast understatement. The question then becomes: How may such a right be enforced? Due to the new context in which it arises, the fundamental right to access judicial records is now facing a nonsensical procedural hurdle that may be remedied through precedent set by this Honorable Court in this appeal. Although the Superior Court noted that common law and constitutional arguments were raised, the Superior Court failed to view these procedural rules through the lens of the constitutional right to access, which resulted in an arbitrary interpretation of procedural rules and the Hope Act.

Part of the confusion in this appeal stems from the Respondents' insistence that the records at issue are not "court records." The Superior Court likewise noted that the records were not "court records." This distinction may be relevant in regard to whether Uniform Superior Court Rule 21 applies as a vehicle for standing, but insofar as we are discussing the public's right to access judicial records, these arguments are misplaced.

The hearing was judicial in nature. In the administrative hearings below, the parties were granted notice and the opportunity to be heard, the hearing officer examined and weighed evidence, the hearing officer was required to exercise discretion and judgment in application of the law to a particular set of facts, two or more litigants were involved, and the conclusion was binding upon the parties. *See Laskar v. Bd. of Regents of Univ. Sys. of Georgia*, 320 Ga. App. 414, 416–17 (2013) (internal citations and quotations omitted) (setting forth the factors that are necessary for an administrative hearing to be "judicial" in nature).

Not only was the hearing judicial in substance, but it was also judicial in form. Throughout the Administrative Rules of Procedure, the Office of State Administrative Hearings refers to itself as a "Court." *See* Ga. Comp. R. & Regs. 616-1-2-.02 (1) (explaining that the administrative rules of procedure govern all actions and proceedings "before the Court."); *see also* Ga. Comp. R. & Regs. 616-1-2-.02 (1) (defining "Administrative Court" or "Court" as "a Judge of the Office of State Administrative Hearings."); O.G.C.A. § 50-13-13(7) (providing that failure to comply with a subpoena issued by the administrative law judge shall be cause for punishment as for contempt of court); O.G.C.A. § 50-13-13(9)(b) (providing that the ALJ "shall have the same rights and powers given the court under Chapter 11 of Title 9, the "Georgia Civil Practice Act."); *Georgia*

Dep't of Hum. Servs. v. Steiner, 815 S.E.2d 883, 887 (Ga. 2018) (holding that "the superior court erred in reversing the administrative law court.").

As such, the records are judicial in nature. They were filed into a judicial record, as part of a judicial proceeding, for the purpose of reaching a judicial decision. *See id*. A finding that the records are judicial in nature is important because the presumptive right of public access to court documents "begins when a judicial document is filed." *Atlanta J. v. Long*, 258 Ga. 410, 369 S.E.2d 755 (1988), *opinion corrected,* 377 S.E.2d 150 (Ga. 1989). In similar contexts, this Honorable Court has refused to accept arguments that a record that meets a definition by substance should be exempt from public access based on form or technicality. *See, e.g., United HealthCare of Georgia, Inc. v. Georgia Dep't of Cmty. Health*, 666 S.E.2d 472, 477 (Ga. Ct. App. 2008) (explaining that certain records were public by nature, despite their not having been in the physical custody of the agency). A finding that these records are not "court" or "judicial" records records by nature defies common sense.

The Hope Act, and any procedural rule or statute providing access to judicial records, should be read in a way that supports the common law, constitutional right of access. *Bd. of Pub. Educ. for City of Savannah v. Hair,* 581 S.E.2d 28, 30 (Ga. 2003) ("When a statute can be read in both a constitutional and unconstitutional manner, the courts apply the construction that upholds the law's constitutionality.")

The Superior Court's failure to interpret the applicable statutes and rules in this larger constitutional context was reversible error and represents a stark departure from decisions that have previously emanated from this Honorable Court, and the Georgia Supreme Court. *See Gray v. State,* 310 Ga. 259, 265 (2020) (holding that when interpreting statutes and rules, the court must assume "that the legislature knew about the common-law rule, wanted to keep the rule, and understood that it would be unnecessary to write the rule into the statute when courts have incorporated the common-law rule into the statute for decades."); *see also Merch. L. Firm, P.C. v. Emerson,* 800 S.E.2d 557, 561 (Ga. 2017) (reconsideration denied) ("The right of access to court records under court rule is coextensive with the common law right of access to court proceedings.")

b. The Superior Court erred in its interpretation of the Hope Act

The Hope Act, which governs the actions of the Georgia Access to Medical Cannabis Commission and the licensing process, provides as follows regarding confidentiality:

> All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part, other than information published in an official commission report regarding the activities conducted pursuant to this article, shall be confidential data and shall not be subject to [the Open Records Act]; provided, however, that any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to this article shall be subject to [the Open Records Act].

O.C.G.A. § 16-12-220(a). Records in a judicial proceeding are not records of "activities conducted pursuant to" the Hope Act. There is nothing in the plain language of the Hope Act that addresses sealing judicial records. In cases relating to sealing judicial records, the Georgia Supreme Court has never held that a document's pre-determined "confidentiality" is an automatic bar when those same records later become part of a judicial proceeding and judicial records; rather, the fact that information is confidential is a factor to be weighed against the public's interest in disclosure. *Savannah Coll. of Art & Design v. Sch. of Visual Arts, Inc.,* 515 S.E.2d 370, 372 (Ga. 1999) (explaining that the confidentiality of a document was a factor that the trial court should have weighed in the balancing test process when determining whether to seal the judicial record).

The standard of withholding *agency* records from the public under the Open Records Act and the standard of withholding *judicial* records from the public are different. *See, e.g., In re Atlanta J.-Const.,* 519 S.E.2d 909, 911 (Ga. 1999) ("By their nature, civil lawsuits quite often cause litigants to experience an invasion of privacy and resulting embarrassment, yet that fact alone does not permit trial courts to routinely seal court records."). Likewise, these two types of records have different mechanisms of access. *See Green v. Drinnon, Inc.,* 417 S.E.2d 11, 12 (Ga. 1992) (explaining that procedural rules govern public access to judicial records, and simultaneously declining to address whether a judicial record was

available under the Open Records Act). This is why the Superior Court's decision, which rested on the statutory language that exempts certain information from disclosure under the Open Records Act but includes no mention of sealing judicial records, was error.

Even if we read an implied sealing mechanism into the Hope Act, the information being sought doesn't fit the definition of what is "confidential." *See* O.C.G.A. § 16-12-220(a). There are many items that could be in the judicial record that were never "produced by, obtained by, or disclosed to the Commission" pursuant to the licensing process— for example, scheduling orders issued by the administrative law judge, copies of the written protest (these were voluntarily hosted on the Commission's website by the Commission), legal arguments (not factual statements) including citations to case law or statute, entries of appearance, rulings on preliminary matters, motions and responses, *etc*. *See id*.

The Hope Act provides for the confidentiality of information that is obtained by/produced by/disclosed to (past tense) the Commission "pursuant to the activities conducted pursuant to this part." O.C.G.A. § 16-12-220(a). A reasonable interpretation of these provisions indicates that the "activities" referenced by the Hope Act are limited to the licensing process. *See id*. Reviewing Part 2 of the Hope Act, which discusses the Role of the Commission, there is no reference whatsoever to litigation following the licensing process or post-award protest procedures. *See*

O.C.G.A. § 16-12-210 *et seq.* If the parties submitted *new* arguments, raised for the first time in a judicial process that is outside of and in addition to the licensing process contemplated by the Hope Act— none of those new arguments would qualify under the confidentiality protections of the licensing process, except to the extent that they include the information that was submitted to the Commission earlier, as part of the licensing process. *See id*.

Finally, to the extent that the Superior Court based its holding on deference to the administrative law judge's interpretation of the Hope Act, this was also reversible error. "While judicial deference is afforded an agency's interpretation of statutes it is charged with enforcing or administering, the agency's interpretation is not binding on the courts, which have the ultimate authority to construe statutes." *Eagle W., LLC v. Georgia Dep't of Transp.,* 720 S.E.2d 317, 321 (Ga. Ct. App. 2011). "It is the role of the judicial branch to interpret the statutes enacted by the legislative branch and enforced by the executive branch, and administrative rulings will be adopted only when they conform to the meaning which the court deems should properly be given." *Id*. The Superior Court had a duty to review the statutory language and to construe its meaning— especially since the plain language of the statute didn't include any mention of sealing judicial records— instead of simply adopting the ALJ's erroneous construction.

c. The Superior Court erred by not finding that the Foundation has standing to bring this appeal under the Administrative Procedure Act

There is standing for this appeal under the Administrative Procedure Act. No party contested that the Commission is an agency for purposes of the APA, and no party contested that the Foundation had standing under the APA to bring this appeal. The Foundation argued standing under the APA at length, but the Superior Court failed to address it in the original Final Order. [2]

The Foundation meets the standard of an "aggrieved party" as defined in O.C.G.A. § 50-13-19 (a), which provides both jurisdiction and standing. "Any person" who is "aggrieved by a final decision in a contested case" is entitled to judicial review. Ga. Code Ann. § 50-13-19 (a). One need not be a party to the original dispute to obtain standing under the APA. *See Georgia Power Co. v. Campaign For a Prosperous Georgia,* 255 Ga. 253, 254–56, 336 S.E.2d 790, 792–93 (1985); *see also N. Fulton Med. Ctr., Inc. v. Roach*, 263 Ga. 814, 815, 440 S.E.2d 18, 20 (1994) (explaining that a nonparty may be "aggrieved" and maintain standing for purposes of the APA).

[2] The Final Order of the Fulton County Superior Court was three pages in total and addressed, very briefly, some of the primary issues. On March 1, 2023, the Foundation filed a Motion to Amend the Final Order with the Superior Court, asking the Court to include all of the issues that were raised. *See* O.C.G.A. § 9-11-52. The outcome of that Motion is still pending. In anticipation of the Superior Court's forthcoming amended order, we have enumerated all issues raised by the Foundation.

In the briefing below, the Foundation explained that it has suffered a special injury, because it now faces a specific and actual hurdle in its mission as an educational nonprofit that it did not face before the entry of this order, and so cannot fulfill its commitment to the public. The Foundation also argued that its organizational members and board members have suffered an injury. The Foundation's board is made up of journalists and media law attorneys who intend to request and report on these specific records. Separate from its board, the Foundation has organizational members who benefit from its advocacy— these members have also been harmed by this order. *See Georgia Power Co. v. Campaign for a Prosperous Georgia*, 336 S.E.2d 790 (Ga. 1985) (explaining that a non-party organization was "aggrieved" by an administrative order that would ultimately increase utility rates because the organization's members were Georgia Power ratepayers); *see also Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta,* 638 S.E.2d 307, 312 (Ga. 2006) (explaining that standing in an administrative appeal may be established by a showing of interests or rights which will be affected by the action).

The Superior Court's failure to find that the Foundation has standing to bring this action under the APA is a reversible error and should be addressed by this Honorable Court.

d. The Superior Court erred by not finding that the Foundation has standing to bring this appeal under the common law

In Georgia, community stakeholders (including voters, citizens, and taxpayers) have standing to enforce public rights and duties, because community stakeholders are injured when their government does not follow the law. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners,* 880 S.E.2d 168, 184–85 (Ga. 2022). A plaintiff's membership in the community provides the necessary standing to bring a cause of action to ensure a local government follows the law, as "public responsibility demands public scrutiny." *Id.* at 184–85 (quoting *Arneson v. Bd. of Trustees of Employees' Ret. Sys. of Georgia,* 361 S.E.2d 805, 806 (Ga. 1987)). The Foundation's members are community stakeholders, and this fact was alleged during the proceedings below. *See* Tab 3 at ¶¶ 11-15. In addition to being voters, citizens, and taxpayers, they are also journalists who seek to inform other Georgians about the workings of their government, and attorneys who seek to promote the integrity of the litigation process.

While this standing doctrine has been applied primarily in cases where citizens have brought actions to compel or enjoin the ministerial acts of a public official, there is no precedent limiting the doctrine to mandamus or injunctive actions. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners,* 880 S.E.2d 168, 183 (Ga. 2022) (Although *Montgomery* was a mandamus case, and OCGA § 9-6-24 is found in a part of the Georgia Code dealing with mandamus, we have applied this general [standing] rule more broadly.") Moreover, litigants

pursuing actions in the nature of a motion to unseal court records have been specifically instructed not to bring mandamus or injunctive actions, but to style their actions as motions to unseal, which is why the Foundation's appeal to the Superior Court was styled in this manner. *See, e.g., Merch. L. Firm, P.C. v. Emerson,* 800 S.E.2d 557, 560 (Ga. 2017); *see also Undisclosed LLC v. State,* 807 S.E.2d 393, 395 (Ga. 2017). As such, the doctrinal standing to enforce this constitutional right of access should be applied to this action to unseal judicial records, whether or not there is a specific procedural rule that provides standing to appeal.

The Superior Court's failure to find that the Foundation has standing to bring this action under the common law is reversible error and should be addressed by this Honorable Court.

e. The Superior Court erred by upholding the decision of the ALJ, when the ALJ failed to follow the bid protest rules developed by the Cannabis Commission

The Commission's bid protest procedures provide that the Commission hearing officer may:

(1) review any confidential Cannabis Commission data in camera *and*

(2) enter a protective order or any other appropriate order necessary to maintain the confidentiality of Cannabis Commission data as required

under O.C.G.A. § 16-12-220(a). Tab 8, Post Award Protest Procedures, Section 3.2 (emphasis added).

The Foundation noted that although the hearing officer has the discretion to engage in this two-step process or to avoid it, the hearing officer may not *partially* engage in the process, as indicated by the use of the conjunctive "and," which mandates the use of *both* procedural steps. Tab 19, p. 70, l. 16. – p. 71, l. 12. In accordance with that standard interpretation of conjunctive phrases in procedural rules, the Foundation argued that the ALJ improperly bifurcated the process when she entered an order sealing the information without first engaging in the prerequisite of *in camera* review. Tab 19, p. 72, l. 22 – p. 74.

These procedural rules, developed by the Commission itself, tell us much about the Commission's interpretation of the statute that it is charged with enforcing. *See* Tab 19, p. 73, l. 19 – p. 74, l. 9. While the Superior Court was *not* required to defer to the ALJ's judicial construction of the Hope Act, it was required to defer to the Commission's ministerial interpretation of the Hope Act, as inferred by the bid protest procedures. *Schrenko v. DeKalb County School Dist.*, 582 S.E.2d 109 (Ga. 2003) ("Where statutory provisions are ambiguous, courts should give great weight to the interpretation adopted by the administrative agency charged with enforcing the statute.")

First, the bid protest rules demonstrate that the Commission recognizes that not everything that is in the judicial hearing record will be "confidential data" under the Hope Act's confidentiality language found in O.C.G.A. § 16-12-220(a). *See* Tab 8, Post Award Protest Procedures, Section 3.2 (explaining that the protective order must only be entered to the extent that it is "necessary to maintain" the confidentiality of Cannabis Commission data).

Second, the rules demonstrate that the Commission expected the ALJ to review the record *in camera*, which implies that even if a seal or protective order were entered, it would be partial, and would not include the entire record. If the ALJ had followed the bid protest rules put in place by the Commission, the Foundation would likely already have the relief it is seeking.

The ALJ had a duty to follow the prescribed process of the bid protest rules before sealing the record, which she did not do. As such, the Superior Court erred in upholding her decision, which was made on improper procedure, contrary to the procedures prescribed by the Cannabis Commission. *See* O.C.G.A. § 50-13-19 (h) (an administrative law judge's decision is reversible error when made upon unlawful procedure or affected by some other error of law).

f. The Superior Court erred by finding that the bid protest rules do not permit the public to challenge a limitation to access placed on judicial records

The Superior Court held, in relevant part, that the Foundation's reliance on the bid protest rules was misplaced "because those rules do not apply to the public or the media, but rather to 'interested applicants,' defined by those rules to mean 'an actual or prospective applicant with a direct economic interest in the procurement of a Class 1 or Class 2 production license.'" Tab 1 at p. 3. This is effectively a holding that no member of the public has standing to challenge any decision of an ALJ, in any action that is governed by, or partially governed by, the bid protest procedures.

This is an error because the bid protest rules contemplate acts that would infringe public access. The rules provide that, having followed the *in camera* review process, "[t]he hearing officer may also order sealed any portion of the record upon request of any of the parties or upon his own accord." Tab 8, Post Award Protest Procedures, Section 3.3. The implication of the rule is that the record was sealed from the public, not from the parties. Next, the ALJ sealed the proceedings. Again, the proceedings were sealed from the public— the parties were present. While the bid protest rules may not expressly provide that a member of the public can use them to challenge the seal, they do contemplate public access because they provide some protections for it, namely, *in camera* review and an order that is limited in scope, and here, there is no question that the public interest was affected by the application of these rules.

When construing the bid protest rules, the Superior Court had a duty "to consider the results and consequences of any proposed construction" and not to construe the rule in a way that would "result in unreasonable or absurd consequences." *See Staley v. State*, 672 S.E.2d 615, 616 (Ga. 2009) (internal citations and quotations omitted). In cases of statutory or rule construction, the interpretation "must square with common sense and sound reasoning." *Id*. The Superior Court's interpretation of the bid protest rules is not absurd to the extent that a member of the public seeks to bring a bid protest, as a non-applicant would have a very strained or attenuated interest, at best, in the outcome of the licensing dispute. But in a case like this one, where a judicial hearing and judicial records were closed to the public, it is an absurd result to acknowledge (1) that the constitution and common law grants the public a right of access to judicial records, and (2), that the bid protest rules contemplate public access, and then, despite these findings, to hold that the public has no ability to challenge the ALJ's failure to follow the bid protest rules, which, if followed properly, would have granted such access.

This Honorable Court should grant this appeal to review the Superior Court's erroneous interpretation of the bid protest rules as an impenetrable block to accessing these judicial records. *See Retention Alternatives, Ltd. v. Hayward*, 678 S.E.2d 877, 879 (Ga. 2009) (statutory provisions and rules are "to be construed in

connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and its meaning and effect is to be determined in connection with common law and court decisions.").

g. The Superior Court erred by holding that the Administrative Rules of Procedure did not apply in the administrative hearing

The Superior Court held, without explanation, that "Georgia's Administrative Rules of Procedure do not seem to squarely apply to this bid protest…." Tab 1 at p. 3. The Respondents argued that the Administrative Rules of Procedure did not apply at all, instead arguing that only the bid protest procedures governed the dispute. Tab 5 at p. 8.

The Administrative Rules of Procedure govern all actions and proceedings "before the Court." Ga. Comp. R. & Regs. 616-1-2-.02 (1). The Administrative Rules of Procedure define "Court" as "either the Office of State Administrative Hearings, which is part of the executive branch of state government; or a Judge of the Office of State Administrative Hearings." Ga. Comp. R. & Regs. 616-1-2-.01 (1). The matter in question was heard before a Judge of the Office of State Administrative Hearings, therefore, the Administrative Rules of Procedure applied to the proceedings at issue regardless of the judge's designation as a hearing officer for another administrative agency. *See* Ga. Comp. R. & Regs. 616-1-2-.02 (1); Ga. Comp. R. & Regs. 616-1-2-.01 (1).

Furthermore, the record indicates that the ALJ used the Administrative Rules of Procedure throughout the proceeding. The ALJ relied upon the Administrative Rules of Procedure as support for issuing the prehearing order and, in other instances, throughout the prehearing order. *See* Tab 5 at p. 103. For example, in the ALJ's Prehearing Order issued on June 12, 2022, the ALJ expressly invoked the Administrative Rules of Procedure when instructing the parties how to file their requests to seal the record:

> Request to Seal Record: Any party may request that any portion of the record be sealed, or the court may on its own accord determine that the record, or any portion thereof, shall be sealed. Requests to seal the record should be made by filing a motion pursuant to Ga. Comp. R. & Regs. 616-1-2-.16.

Tab 5 at p. 103. As such, the Superior Court erred by holding that the Administrative Rules of Procedure did not apply to the proceeding before the administrative law judge.

h. The Superior Court erred by holding that the Administrative Rules of Procedure permit the ALJ to place a blanket seal over these judicial records

The Superior Court then noted that to the extent that the Administrative Rules of Procedure applied, "those rules do not *require* public disclosure." Tab 1 at p. 3 (emphasis added). This statement flips the right-to-access presumption on its head. The proper question is not whether the procedural rules require public *disclosure.* The proper question is whether an applicable confidentiality law

requires *sealing. See* Ga. Comp. R. & Regs. 606-1-2-.23 (echoing the common law presumption that the administrative hearing record "shall be available to the public," which can only be overcome where there is a specific law that requires confidentiality).

The Office of State Administrative Hearings, like every other tribunal in Georgia, recognizes the public's right to access judicial records, not only in its procedural rules, but in its case law. In *Ga. Composite Medical Board v. Dodds, M.D.*, a judge of the Office of State Administrative hearings opined that Georgia's interest in "public trials that are open to the press and public" extends to all proceedings before administrative law judges. OSAH-CSBME-PHY-1444768-33-Malihi (Apr. 30, 2014). In that opinion, the administrative law judge noted that there was a particularly high public interest in the administrative proceedings before him because it was a medical licensing case, and that all medical licensing cases "are of concern to the public, given the potential for danger to the public of the continued licensure of dangerous practitioners." *Id*. at 3-4. Accordingly, the administrative law judge permitted the media to film and audio record certain portions of the hearing, withholding some portions of the hearing due to the application of a confidentiality law. *See id*. That is the exact procedure that should have happened at the medical cannabis licensure hearings, where equally serious allegations of potential public harm were being made. But in this case, the ALJ

sealed the proceedings and the entire record, with no analysis or consideration of the applicable rules and presumptions of openness. This was a failure of the ALJ to follow indistinguishable administrative law precedent involving confidentiality laws similar to the Hope Act. Because the administrative rules and the administrative case law create a presumption of openness and a preference for partial seals, the Superior Court erred by holding that the blanket seal was proper under the Rules of Administrative Procedure.

V. CONCLUSION

Precedent is desirable in this case to establish the proper interpretation of the Hope Act's confidentiality language and the applicability or non-applicability of the procedural rules implicated by this matter. But most importantly, precedent from this Honorable Court would clarify whether citizens can expect the same level of access to medical cannabis records in a judicial process that they currently have for physician licensing disputes and similar matters of significant public interest. For decades, Georgia's courts have safeguarded the rights of its citizens to inspect judicial records. Yet, the decision below exempts all records in judicial proceedings that result from cannabis licensing disputes. The Foundation requests that this Honorable Court accept this appeal to address these errors.

This 10th day of March, 2023. This submission does not exceed the word count limit imposed by Court of Appeals Rule 24.

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CERTIFICATE OF SERVICE

Pursuant to O.C.G.A. § 5-6-32 (a) and Ga. Court of Appeals Rule 6, at or prior to filing, I have served a copy of the foregoing via mail on this the 10th day of March, 2023, upon the following:

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Pursuant to Ga. Court of Appeals Rule 6, I certify that there is a prior agreement with the parties listed below to allow PDF documents sent via email to suffice for service in this matter. Accordingly, I have served a copy of the foregoing via email on this the 10th day of March, 2023, upon:

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TAB 10

IN THE COURT OF APPEALS
STATE OF GEORGIA

GEORGIA FIRST AMENDMENT FOUNDATION, **Appellant,** **v.** **REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC,** **Plaintiff-Respondents,** **and** **FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC.** **Defendant-Respondents.**	**APPLICATION NO. A23D0265** **SUPERIOR COURT OF FULTON COUNTY; CIVIL ACTION FILE NO. 2022CV370799**

DEFENDANT-RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO APPLICATION FOR DISCRETIONARY APPEAL

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Defendant-Respondents FFD GA Holdings, LLC, TheraTrue Georgia, LLC Natures GA, LLC and Treevana Remedy, Inc. (the "Prospective Licensees") oppose the Application for Leave to Appeal filed by Appellant Georgia First Amendment Foundation ("GFAF"). GFAF's Application should be denied because the Superior Court of Fulton County correctly denied GFAF's Motion to Unseal. It should also be denied because GFAF asks this Court to consider issues that the Superior Court of Fulton County never ruled on, and thus there is no ruling to review for legal error—much less reversible error.

BACKGROUND

In 2019, the Governor of Georgia signed into law Georgia's Hope Act, O.C.G.A. § 16-12-200 *et seq.* (2019). The Hope Act created the Georgia Access to Medical Cannabis Commission (the "Commission") and granted it authority to oversee the regulated licensing of the in-state growing of cannabis and the production, manufacturing, and sale of low THC oil for medical purposes. *See* O.C.G.A. § 16-12-210 (delineating powers, duties, and responsibilities, of the Commission).

The Hope Act provides that the Commission shall grant two Class 1 and four Class 2 production licenses "pursuant to contracts awarded through competitive sealed bids or competitive sealed proposals as provided for in [the State Purchasing Act]." O.C.G.A. § 16-12-221(a). Pursuant to this authority, in December 2020, the

Commission publicly released a Competitive Application Request for Proposals for Class 1 and Class 2 production licenses (the "RFP"). In response, 48 companies—including the 14 Plaintiff-Respondents and the four Defendant-Respondents (but not GFAF)—submitted an application for a Class 2 production license.

On July 24, 2021, after evaluating and scoring all the Class 2 applications, the Commission awarded the four Defendant-Respondents the highest scores among the Class 2 applicants, making them the Class 2 Prospective Licensees. Upon learning that they were not one of the top four finishers in Class 2, each of the 14 Plaintiff-Respondents filed a post-award protest with the Commission under the Commission's Post-Award Protest Procedures (the "Procedures").

Under Section 3.0 of the Procedures, "[t]he [Commission's] Executive Director or designee . . . serve[s] as the hearing officer during the protest process." (Ex. 10 (Procedures), p. 7, § 3.0).[1] Section 3.4 of the Procedures provides that "[t]he standard for reviewing the evaluation of applications is one of deference to any reasonable judgment of the Cannabis Commission or of the evaluation team." (*Id.*, p. 8, § 3.4). Thus, the protester bears the burden to establish that the Commission's determination "lacked a reasonable basis." (*Id.*). Further, the post-award protest hearing cannot reevaluate the Class 2 applications *de novo* or redo the licensing

[1] Citations to numbered exhibits correspond to the exhibits attached to GFAF's Application.

determination the Commission has already undertaken. Instead, a hearing conducted under Section 3.4 of the Procedures merely reviews the Commission's determinations for certain enumerated errors. Section 3.3 of the Procedures sets forth the parameters for the post-award protest hearings:

> **Section 3.3. Hearing**. Both the interested applicant and prospective licensee shall have a right to appear before the hearing officer for oral argument. The interested applicant and prospective licensee shall also have the right to submit briefs, documents, and witness testimony in the form of affidavits no later than five (5) business days before the scheduled hearing. The hearing officer may also solicit additional information from the interested applicant or prospective licensee after the hearing and prior to the issuing of the final decision. The hearing officer may also order sealed any portion of the record upon request of any of the parties or upon his own accord.

Notably, the Procedures do not allow for live witness testimony or cross-examination at a post-award protest hearing. (*Id.*). Nor do they state that the rules of evidence apply, as they would in Georgia's Superior Courts. (*Id.*).

In May 2022, the Commission voted to transfer the designation of hearing officer for all post-award protests to the Office of State Administrative Hearings ("OSAH"). (*See* Ex. 14 (Meeting Summary, Special Called Commission Meeting, Wednesday, May 5, 2022), p. 2). At the same time, the Commission authorized the new designee (ultimately, the Hon. Stephanie Howells) "to fulfill the role and responsibilities of Hearing Officer ***pursuant to the Commission's Post-Award Protest Procedures***." (*Id.* (emphasis added)). That is, *not* pursuant to the Uniform Superior Court Rules or the Administrative Rules of Procedure.

In her capacity as the Commission-designated Hearing Officer, Judge Howells promptly issued a Notice of Hearing and Prehearing Order that set hearings on the 14 Class 2 post-award protests to occur throughout July 2022. (*See*, *e.g.*, Exs. 15 (Notice of Hearing) and 16 (Prehearing Order)).[2] Consistent with the Commission's mandate to conduct the protests "pursuant to the Commission's Post-Award Protest Procedures," Judge Howells' Notice of Hearing and Prehearing Order made clear that the Procedures governed the protests. (Ex. 14, p. 2; Ex. 15 (listing the Hope Act and the Procedures as the "Statutes and Rules Involved"); Ex. 16, p. 2, ¶ 8 (noting that "the parties will be limited to the Post-Award Procedures as set forth by the Commission")).

Like the Procedures, Judge Howells' Prehearing Order provided a mechanism for parties to request that the record be sealed:

> **Request to Seal Record**: Any party may request that any portion of the record be sealed, or the court may on its own accord determine that the record, or any portion thereof, shall be sealed. Requests to seal the record should be made by filling a motion pursuant to Ga. Comp. R. & Regs. 616-1-2-.16.[3]

[2] The Notices of Hearing and Prehearing Orders filed in all 14 protests were substantially the same.

[3] Rule 616-1-2-.16 merely states the general requirements for filing motions under the Administrative Rules of Procedure. It does not reference a process or standard for filing under seal.

(Ex. 16, p. 2, ¶ 5). Consistent with this portion of Judge Howells' Prehearing Order, the Prospective Licensees, on June 6, 2022, filed a Joint Motion to Seal[4] in all Class 2 protests pending before Judge Howells, citing the Hope Act's confidentiality protections, which provide that:

> [a]ll working papers, recorded information, ***documents, and copies produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part***, other than information published in an official commission report regarding the activities conducted pursuant to this article, ***shall be confidential data and shall not be subject to [the Georgia Open Records Act]***; provided, however, that any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to this article shall be subject to [the Georgia Open Records Act].

O.C.G.A. § 16-12-220(a) (emphasis added). Pursuant to these protections, virtually any materials provided to, or received from, the Commission pursuant to the procurement process are deemed to be "confidential data," including, but not limited to, the Prospective Licensees' applications and any documents in the procurement process that reflect the content of their applications. The Prospective Licensees' applications include technical and nontechnical data about their processes, partnerships, methods, devices, and techniques. The General Assembly recognized the importance of robust protection for *all* applicants' confidential information in this unique procurement process, and it adopted these statutory confidentiality

[4] *See* Ex. 3.

protections to induce applicants to share more detailed and insightful material in their applications. All of the applicants, including the 14 Plaintiff-Respondents,[5] relied on these protections when developing their submissions to the Commission.

Judge Howells' granted the Prospective Licensees' Motion to Seal on June 23, 2022, relying on the Hope Act's confidentiality protections:

> Pursuant to Georgia Code Section 16-12-220, these matters have been designated as confidential. Accordingly, any documents submitted or filed, any transcripts, or recordings are not subject to the Georgia Open Records Act and therefore will not be publicly disclosed. Furthermore, the hearing in these cases and in all cases referred to the Office of State Administrative Hearings ("OSAH") by the Georgia Access to Medical Cannabis Commission ("Commission") will be closed to the public, and to non-parties, their representatives, and their counsel.

(Ex. 6, p. 5).

After all the post-award protest hearings occurred, Judge Howells, on September 16, 2022, issued detailed Final Decisions denying all 14 post-award protests. The Final Decisions analyzed all of the protesters' legal arguments, weighed all of their factual arguments regarding the scoring of their respective applications, and ultimately disposed of each protest ground, stating the legal principles and evidence relied upon in reaching those conclusions.[6]

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[5] Indeed, one of the Plaintiff-Respondents opposed GFAF's Motion to Unseal in the lower court. (*See generally* Ex. 9).

[6] Several other appeals currently before the Court raise the question of the scope and applicability of the Administrative Procedure Act in connection with appellate review of Judge Howells' Final Decisions. *See, e.g.*, Case Nos. A23A1091;

After Judge Howells issued the Final Decisions, GFAF, on September 28, 2022, filed its "Motion to Unseal (in the Nature of an Application for Interlocutory Review)" in the Superior Court of Fulton County seeking to nullify the law under which Judge Howells' order was entered—the Hope Act's confidentiality protections—and to unseal the records of the post-award protest proceedings. (*See* Ex. 2). In its Motion, GFAF relied on Uniform Superior Court Rule 21. But as the Superior Court of Fulton County correctly held in its Final Order Denying Motion to Unseal, that rule "does not apply because the bid protests are neither pending in Superior Court nor are they 'court records' within the meaning of that rule." (Ex. 1, pp. 2–3).

In addition to the Uniform Superior Court Rules, the Superior Court of Fulton County addressed the applicability of the Hope Act's confidentiality protections, the Open Records Act, and the Administrative Rules of Procedure. (*See id.*). The lower court declined to address GFAF's "general constitutional arguments," noting that GFAF never argued "that the statute on which the hearing officer relied in sealing the record (O.C.G.A. § 16-12-220) was, in itself, unconstitutional." (*Id.*, p. 2).

Unsatisfied with the lower court's order, GFAF, on March 1, 2023, filed a "Motion to Amend the Final Order," asking the lower court "to amend its Final Order

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A23A2017; A23A0877; A23A0920; A23A0862. GFAF is not a party to any of those appeals.

. . . to address several issues raised . . . ***but not addressed by***" the Final Order. (GFAF Motion to Amend the Final Order, p. 1 (emphasis added);[7] *see also* Application, p. 22). Even so, GFAF now asks this Court to consider those exact same issues—issues that GFAF admits the lower court never ruled on.

JURISDICTION

Even if the lower court had ruled on GFAF's "general constitutional arguments," it is questionable whether this Court would have jurisdiction to consider those issues. (Ex. 1, p. 2). The crux of GFAF's argument is that any statute, rule, policy, procedure, or guideline—whether the Hope Act, the Administrative Rules of Procedure, or the Commission's Procedures—that does not mandate public disclosure of the post-award protest records is unconstitutional as applied to these proceedings. (*See* Application, p. 17 ("The Hope Act, and any procedural rule or statute providing access to judicial records, should be read in a way that supports the common law, constitutional right of access.")).

GFAF concedes that the Supreme Court of Georgia has exclusive appellate jurisdiction in "all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question." Ga. Const. Art. VI, § 6, ¶ 2. Nevertheless, in an attempt to circumvent the Supreme Court of Georgia's exclusive

[7] GFAF did not include its Motion to Amend the Final Order in the exhibits to its Application. It is attached hereto as **Exhibit A**.

appellate jurisdiction, GFAF suggests that this Court has jurisdiction to consider those issues because this case only requires this Court to apply the Supreme Court's "existing constitutional guidance." (Application, p. 11).

Because this Court's constitutional jurisdiction is limited to "identical" constitutional challenges previously decided by the Supreme Court of Georgia and there is no such challenge here,[8] it is doubtful this Court would have jurisdiction to consider those issues if the lower court had ruled on them. *Williams v. State*, 273 Ga. 848, 849 (2001); *see also State v. Davis*, 303 Ga. 684, 688 (2018) (jurisdiction proper in Supreme Court, not Court of Appeals, because appeal required more than "merely an application of unquestioned and unambiguous constitutional provisions") (quoting *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 304 (2016)).

STANDARD OF REVIEW

Pursuant to Court of Appeals Rule 31(b) ("Burden of Proof"), GFAF "bears the burden of persuading the Court that the application should be granted. An application for leave to appeal a final judgment in cases subject to discretionary appeal under O.C.G.A. § 5-6-35 will be granted only when: (1) [r]eversible error appears to exist; [or] [t]he establishment of a precedent is desirable." Here, there is no reversible error—indeed no error at all—in the lower court's Final Order. In

[8] GFAF itself acknowledges that its Application presents "an issue of first impression." (Application, p. 3).

some instances, there is no ruling at all. And without any actual error, there is not an issue upon which there is any need to "establish" a new precedent. Therefore, GFAF's Application is due to be denied.

LEGAL ARGUMENT

The Superior Court of Fulton County was correct in denying GFAF's Motion to Unseal because no law or rule requires disclosure of the Commission's confidential records to GFAF, a non-party to the underlying proceedings that, by its own admission, "has no legal interest in the substance of the licensing protests." (Ex. 2, p. 4). As the Superior Court of Fulton County correctly concluded: (1) Uniform Superior Court Rule 21, on which GFAF's Motion to Unseal was based, does not apply; (2) the Hearing Officer was authorized to seal the protest records under the Hope Act's confidentiality protections; (3) the Administrative Rules of Procedure do not apply (and even if they did, they do not require disclosure); and (4) GFAF lacks standing to rely on the Commission's Procedures. Because no reversible error exists with respect to any of these issues—much less reversible error—GFAF's Application should be denied. With respect to all other issues raised in GFAF's Application, there is simply nothing to review.[9]

[9] GFAF admits in its Application that it couches as "error" issues that the lower court never ruled on. (Application, p. 22).

A. GFAF Asks this Court to Consider Issues the Lower Court Never Ruled On.

At the outset, the Court can dispense with several issues raised in GFAF's Application because the lower court never ruled on them. Where "the trial court has not ruled on [a given issue], there is no ruling to be reviewed on appeal." *City Of Gainesville v. Dodd*, 275 Ga. 834, 838 (2002) (citation omitted). This fundamental tenet of appellate practice "that the appellate courts do not rule on issues not ruled on by the trial courts preserves the appellate courts' jurisdiction and delineates the proper roles of the courts at the trial and appellate levels." *Id.* "The primary role of the appellate courts, and, in general, their jurisdiction, is properly preserved only when there is a ruling below." *Id.*

Here, GFAF asks this Court to consider several issues without a ruling below. For instance, GFAF argues that the lower court's "failure to interpret the applicable statutes and rules in [the] larger constitutional context" constitutes reversible error. (Application, p. 18). It is not error—much less reversible error—for the lower court not to rule on a party's preferred issue. Indeed, since the lower court issued its Final Order, GFAF has gone back to the lower court and asked it to address its constitutional arguments, which GFAF admits were "not addressed by the [Final Order]." (Ex. A, p. 1). As the Supreme Court explained in *Dodd*, where there has been no ruling by the lower court on an issue raised on appeal, "there [is] no ruling[]

to review for legal error." *Dodd*, 275 Ga. at 837 (citing *Farmer v. State*, 266 Ga. 869, 871 (1996)).

Similarly, GFAF argues that the lower court "erred by not finding that [GFAF] has standing to bring this appeal under the Administrative Procedure Act." (Application, p. 22). As GFAF acknowledges, the lower court "did not address the issue of whether [GFAF] has standing under Administrative Procedure[] Act." (Ex. A, p. 3, ¶ 8). Because the lower court did not rule on this issue, there is no ruling to review for legal error. *Dodd*, 275 Ga. at 837.

The same is true of GFAF's argument that the lower court's "failure to find that [GFAF] has standing . . . under the common law is reversible error." (Application, p. 25). The lower court did not rule on that issue, as explicitly acknowledged by GFAF in its Motion to Amend the Final Order. (*See* Ex. A, p. 3, ¶¶ 10–11)). "Because there has been no definitive ruling by the trial court on this issue, there is no ruling to review for legal error." *CL SNF, LLC v. Fountain*, 364 Ga. App. 371, 378 (2022).

B. No Reversible Error Exists with Respect to the Issues the Lower Court Ruled On.

1. Uniform Superior Court Rule 21 Does Not Apply to the Hearing Officer's Decision to Seal the Post-Award Protest Records.

GFAF's Motion to Unseal was premised almost exclusively on Uniform Superior Court Rule 21.[10] (Ex. 2, p. 2). As the lower court correctly concluded, "Rule 21 of the Uniform Superior Court Rules does not apply because the bid protests are neither pending in Superior Court nor are they 'court records' within the meaning of that rule." (Ex. 1, pp. 2–3). Indeed, the Uniform Superior Court Rules do not apply *at all*.

The Uniform Superior Court Rules govern procedure in Georgia's Superior Courts. They do not, however, govern procedure in other judicial or quasi-judicial bodies in this State, as each has its own procedural rules.[11] By their terms, the Uniform Superior Court Rules apply only to *court* records, not procurement protests within a state agency. *See* U.S.C.R. 21.1 ("Upon motion by any party to any civil or criminal action, or upon the court's own motion, after hearing, the ***court*** may limit access to ***court files*** respecting that action.") (emphasis added); *see also Undisclosed*

[10] GFAF appears to have abandoned its reliance on the Uniform Superior Court Rules, as its Application contains only one passing reference to them. (*See* Application, p. 15).

[11] *See, e.g.*, Unif. St. Ct. Rules; Unif. Mag. Ct. Rules; Unif. Juv. Ct. Rules; Unif. Prob. Ct. Rules.

LLC v. State, 302 Ga. 418, 431 (2017) ("Rule 21 applies only to those materials that are ***filed with the court***.") (emphasis added).

The post-award protest hearings were held before Judge Howells, the Commission-designated Hearing Officer, under the Commission's Procedures; they were not held before a Superior Court judge under the Uniform Superior Court Rules. The Commission specified this when designating Judge Howells as the Hearing Officer. (*See* Ex. 14, p. 2 ("The Commission voted to transfer the designation of hearing officer . . . to the Georgia Office of State Administrative Hearings . . . and authorize such new designee to fulfill the role and responsibilities of Hearing Officer ***pursuant to the Commission's Post-Award Protest Procedures***.") (emphasis added)).

Judge Howells also confirmed the applicable rules on a number of occasions, including by denying certain protesters' requests to issue subpoenas under the Administrative Rules of Procedure, further affirming that neither the Uniform Superior Court Rules nor the Administrative Rules of Procedure governed; the Procedures did.

2. The Administrative Rules of Procedure Did Not Apply to the Post-Award Protests.

Like the Uniform Superior Court rules, the Administrative Rules of Procedure did not apply to the post-award protests. GFAF suggests that because "[t]he matter in question was heard before a Judge of the Office of State Administrative Hearings,

. . . the Administrative Rules of Procedure applied to the proceedings at issue regardless of the judge's designation as a hearing officer for another administrative agency." (Application, p. 30). But as noted above, both the Commission and Judge Howells herself confirmed on numerous occasions that the Administrative Rules of Procedure did not govern the post-award protests; the Commission's Procedures did. (*See* Ex. 14, p. 2 (Commission confirming OSAH would serve as Hearing Officer pursuant to Commission's Procedures); *see also* Ex. 15 (Notice of Hearing informing all parties that "[t]he hearing will be conducted pursuant to the Protest Procedures issued by the [Commission]");[12] Ex. 16, p. 2, ¶ 8 (Prehearing Order informing parties that they "will be limited to the Post-Award Procedures as set forth by the Commission.")).

GFAF's attempts to bring the post-award protests within the ambit of the Administrative Rules of Procedure fail because the post-award protests were not "before the Court," as that phrase is defined in the Administrative Rules of Procedure. *See* Ga. Comp. R. & Regs. 616-1-2-.02 (The Administrative Rules of Procedure govern "all actions and proceedings before the Court."); *see also* Ga. Comp. R. & Regs. 616-1-2-.01 ("'Administrative Court' or 'Court' means either the

[12] Under a heading titled "**STATUTES AND RULES INVOLVED**," the Notice of Hearing listed "O.C.G.A. §§ 16-12-200 to -236" (the Hope Act) and the "Georgia Access to Medical Cannabis Commission's Protest Procedures," not the Administrative Rules of Procedure.

Office of State Administrative Hearings, which is part of the executive branch of state government; or a Judge of the Office of State Administrative Hearings."). As noted above, Judge Howells was sitting as the Commission's Hearing Officer as defined in the Commission's Procedures, not as an OSAH judge. (*See* Ex. 14, p. 2).

3. Even if the Administrative Rules of Procedure Applied, the Hope Act's Confidentiality Protections Take Precedence.

Even if the Administrative Rules of Procedure did apply, the lower court correctly concluded that they "do not require public disclosure." (Ex. 1, p. 3). Rule 616-1-2-.23 expressly provides that the administrative record may be deemed unavailable to the public when there is a "law according confidentiality."[13] The Hope Act is just that: a law according confidentiality. Thus, even if the Administrative Rules of Procedure applied, Rule 616-1-2-.23 confirms that the Hearing Officer was permitted to follow the confidentiality requirements of the governing statute—the Hope Act—and facilitate the resolution of the protests consistent with those requirements. *See* Ga. Comp. R. & Regs. 616-1-2-.23.[14]

[13] GFAF's Application does not even attempt to grapple with Rule 616-1-2-.23's exception ("except as provided by law according confidentiality") to the general rule that the administrative record shall generally "be available to the public."

[14] Rule 616-1-2-.23 is one of several rules intended to ensure that the Administrative Rules of Procedure are applied in a manner consistent with other applicable law (e.g., the Hope Act). *See* Ga. Comp. R. & Regs. 616-1-2-.02(2) (affording judge discretion to relax requirements of Administrative Rules of Procedure to facilitate the resolution of a matter consistent with "other applicable law"); Ga. Comp. R. & Regs. 616-1-2-.02(3) (allowing procedural questions not addressed by the

Accordingly, the Hearing Officer had discretion to seal the post-award protest records to ensure that the Hope Act's confidentiality protections were not circumvented, and it was not error—much less reversible error—for the lower court to conclude as such.

4. GFAF Lacks Standing to Rely on the Commission's Procedures.

GFAF argues that it was error for the lower court to abide by the text of the Commission's Procedures, which provides that they apply only to "an actual or prospective applicant with a direct economic interest in the procurement of a Class 1 or Class 2 production license." (Application, p. 27; Ex. 10, p. 5, § 1.0). GFAF does not argue that it fits within that definition.[15] As such, the Procedures, by their own terms, do not provide a private right of action by a third party to challenge their interpretation and/or application by the Commission.

GFAF nonetheless argues that the lower court had a duty to consider the public policy consequences of applying the Procedures as written. GFAF claims that the lower court erred by not rewriting the Commission's Procedures to GFAF's

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Administrative Rules of Procedure (e.g., sealing of the record) to be "resolved at the Court's discretion, as justice requires"); Ga. Comp. R. & Regs. 616-1-2-.02(4) (giving Court discretion to determine "which law governs a hearing when a Rule conflicts with or is supplemented by a state or federal statute or rule").

[15] Indeed, GFAF admitted in its Motion to Unseal that it "has no . . . interest in the substance of the licensing protests." (Ex. 2, p. 4).

benefit. But the cases cited by GFAF, both of which address statutory construction, have no bearing on the Commission's Procedures, which are neither statutes nor duly promulgated rules. They are policies and procedures that were made part of the Commission's procurement pursuant to the State Purchasing Act. Even if the Procedures were statutes, however, the lower court lacked authority to rewrite the definition of "interested applicant" to suit GFAF's purported mission, and it was certainly not error for the lower court *not* to do so. *See State v. Fielden*, 280 Ga. 444, 448 (2006) ("[U]nder our system of separation of powers this Court does not have the authority to rewrite statutes."); *see also Mod. Homes Const. Co. v. Burke*, 219 Ga. 710, 715 (1964) (courts cannot "add a line to the law, nor can the legislature enlarge or diminish a law by construction") (citation and internal quotation marks omitted).

5. The Hope Act Gives the Commission, by and through the Hearing Officer, Discretion to Seal the Record.

GFAF cannot demonstrate error—much less reversible error—with respect to the lower court's interpretation of the Hope Act, which required that documents and information submitted to the Commission be kept confidential. The Hope Act also granted wide latitude to the Commission to structure the application requirements and pre-and post-award protest procedures. Pursuant to O.C.G.A. § 16-12-210, the Commission had the following, powers, duties and responsibilities:

- Issue licenses related to the production, growing, and manufacturing of low THC oil;
- Establish procedures for granting licenses;
- Establish criteria for applicants and licensees as necessary to ensure market stability and adequate supply;
- Promulgate rules and regulations and adopt policies and procedures necessary to carry out the provisions of Part 2 of the Hope Act, which includes the Hope Act's confidentiality provision that the Hearing Officer relied upon.

Similarly, O.C.G.A. § 16-12-212(b) states that "Class 2 production licenses shall be issued to applicants selected by the commission following a competitive application and review process in accordance with the requirements set forth in this part." Again, this "part" includes the Hope Act's confidentiality protections contained in O.C.G.A. § 16-12-220(a).

None of the authorities cited by GFAF regarding access to judicial records[16] limit the Commission's authority under the Hope Act to maintain the confidentiality of the information submitted by the applicants. The briefing and argument that occurred in the post-award protest hearings before the Hearing Officer required analysis of the details of the applicants' confidential licensing applications. The applications included hundreds of pages of the applicants' site plans, production processes, security and tracking systems, and transportation plans. Making those

[16] GFAF's Application does not explain any meaningful distinction between "judicial records" and "court records."

discussions and arguments public would effectively nullify the Hope Act's confidentiality protections, which the Hearing Officer recognized when granting the Prospective Licensees' Motion to Seal. (*See* Ex. 6). Indeed, for this reason, one of the Plaintiff-Respondents, Curaleaf GA Holdings LLC, opposed GFAF's Motion to Unseal, noting that "[t]he records submitted . . . were proposed business plans which contained confidential information and trade secrets regarding how each applicant planned to operate their business if awarded a license." (Ex. 9, p. 7).

Where an administrative agency decision is the subject of judicial review, judicial deference is to be afforded to the agency's interpretation of statutes it is charged with enforcing or administering, as well as the agency's interpretation of rules and regulations that it has enacted to fulfill the function the legislative branch has granted it. *See Atlanta J. v. Babush*, 257 Ga. 790, 792 (1988) ("[I]n construing administrative rules, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the [rule]."") (citation and internal quotation marks omitted); *see also Dep't of Cmty. Health, Div. of Health Plan. v. Gwinnett Hosp. Sys., Inc.*, 262 Ga. App. 879, 882 (2003) ("[T]he 'interpretation of a statute by an administrative agency which has the duty of enforcing or administering it is to be given great weight and deference.'"") (quoting *Hosp. Auth. of Gwinnett Cnty. v. State Health Plan. Agency*, 211 Ga. App. 407, 408 (1993)).

Here, the Commission, acting under its broad discretion specifically afforded by the Hope Act, determined that the Hope Act's confidentiality protections required the post-award protest records to be sealed. It does not matter that, in GFAF's words, the Hope Act "does not . . . provide a procedural process for sealing judicial records." (Application, p. 5). The Hope Act gave the Commission the authority to determine how to carry out its duties under the Hope Act, including maintaining the confidentiality of application information.[17] The Hope Act directed the Commission to conduct a confidential procurement process, and the Commission's determination that the protest records should be sealed in order to give effect to that requirement was not only authorized, but is entitled to deference under Georgia law.

Nothing in the Uniform Superior Court Rules, the Administrative Rules of Procedure, or any of the cases cited by GFAF construing the public's right to access court records in other circumstances preempted or otherwise authorized the lower court to override the Hope Act's statutory mandate or disturb the Commission's

[17] In its Application, GFAF cites to a number of cases that involve filing under seal in Superior Court, and are thus inapplicable to the administrative protest proceedings at issue here. *See, e.g., In re Atlanta J.-Const.*, 271 Ga. 436, 438 (1999) (appeal of Superior Court of Fulton County's application of Uniform Superior Court Rule 21); *see also Green v. Drinnon, Inc.*, 262 Ga. 264, 264 (1992) (ordering tape recording of State Court judge's comments made in open court to be made public under Uniform State Court Rule 21).

application of the Hope Act's confidentiality protections, and it was certainly not error for the lower court to decline to do so.

6. The Commission Was Not Required to Engage in a Lengthy and Time-Consuming Process of Creating a Partially-Redacted Record.

GFAF argues that it was error for the lower court to uphold the Hearing Officer's decision to seal the protest records when the Hearing Officer "failed to follow the bid protest rules developed by the . . . Commission." (Application, p. 25). In essence, GFAF argues that the Hearing Officer should have conducted a time-intensive and costly review of the record in all of the protests to identify information that fell within the protections of O.C.G.A. § 16-12-220. But GFAF concedes that nothing in the Commission's Procedures required the Hearing Officer to do so. (Application, p. 25).

Further, the Hope Act mandates that "[a]ll . . . recorded information [and] documents . . . produced by, obtained by, or disclosed to the commission pursuant to the activities conducted pursuant to this part" is "confidential data" as a matter of law. O.C.G.A. § 16-12-220(a). This covers every communication to and from the Commission, every page of every application, every brief, every transcript, and every decision issued by the Commission, including the Hearing Officer's decisions. In affording these broad confidentiality protections to the Commission and the applicants, the General Assembly thus mandated, by statute, that all of those

documents should remain confidential *in their entirety*. The General Assembly determined that there is no way to redact these documents in a way that would not reveal information protected by O.C.G.A. § 16-12-220.

GFAF also seems to be under the misapprehension that the lower court's decision rested solely "on the statutory language that exempts certain information from disclosure under the Open Records Act." (Application, p. 20). That is not the case. Like the Hearing Officer's decision, the lower court's decision rested on O.C.G.A. § 16-12-220 *as a whole*. (*See* Ex. 1, p. 2 ("In sealing the proceedings, the Commission, through its hearing officer, relied upon O.C.G.A. § 16-12-220.")). As the Hearing Officer recognized, O.C.G.A. § 16-12-220 states that the information and documents submitted to the Commission "shall be confidential data ***and*** shall not be subject to [the Georgia Open Records Act]." (emphasis added). The requirement that the Commission treat the information and documents as "confidential data" is independent of the exemption from the Georgia Open Records Act, and neither the lower court nor the Hearing Officer's decision rested solely on the Open Records Act exemption.

Even assuming that there are non-confidential "routine judicial documents"[18] and/or information interspersed with the confidential data in the post-award protest

[18] GFAF appears to suggest that "the parties' legal arguments" are "routine judicial documents" not worthy of confidentiality protection. (Application, p. 10). As noted above, the parties' legal arguments extensively analyzed the applicants' confidential

records, the Hearing Officer was well within her discretion to determine that the process of identifying and redacting such information would be overly burdensome and time-consuming and ultimately impede the work of the Commission. The Hope Act prohibits the Commission from "promulgat[ing] any rules or regulations that would unduly burden access to low THC oil or products by registered patients." O.C.G.A. § 16-12-210(b). It also places upon the Commission the significant responsibility of not only awarding production contracts, but also overseeing every other aspect of the nascent low-THC oil industry in Georgia, with the ultimate goal of getting medicine in the hands of the many thousands of qualified Georgians who desperately need it. The Hearing Officer was therefore well within her discretion to decide that scanning tens of thousands of pages for confidential information, redacting it, and sealing only those parts of the record was inconsistent with the Hope Act's mandate to not unduly burden access to low THC oil.[19]

CONCLUSION

In sealing the post-award protest records, the Hearing Officer acted in accordance with the Hope Act, which requires that the records be kept confidential

licensing applications, which include the applicants' most sensitive and proprietary information.

[19] In any event, GFAF does not meaningfully explain how the Hearing Officer allegedly failed to follow a procedure that it admits is discretionary. (*See* Application, p. 25–26 (citing Ex. 10, p. 7, § 3.2).

and affords the Commission broad leeway in determining how to do so. It was not error—much less reversible error—for the Superior Court of Fulton County to deny GFAF's improper attempt to overturn the Hearing Officer's decision. The Superior Court of Fulton County's Final Order was correct, and the issues ruled upon do not require the establishment of new precedent. As to the issues that GFAF admits the Superior Court of Fulton County did not rule on, there is simply nothing for this Court to review. Thus, the Court should deny GFAF's Application.

Respectfully submitted, this 20th day of March, 2023.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2023, I filed the foregoing **DEFENDANT-RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO APPLICATION FOR DISCRETIONARY APPEAL** with the Clerk of Court using the Court's electronic filing system and, in accordance with Court of Appeals Rule 6(b)(2), have served a copy of same on all opposing counsel of record via the United States Postal Service, postage prepaid, addressed as follows:

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TAB 11

Court of Appeals
of the State of Georgia

ATLANTA, April 10, 2023

The Court of Appeals hereby passes the following order

A23D0265. GEORGIA FIRST AMENDMENT FOUNDATION v. REVOLUTION GEORGIA LLC et al.

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

LC NUMBERS:

2022CV370799

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, April 10, 2023.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen , *Clerk.*

TAB 12

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

PURE PEACH ORGANIC, INC., SYMPHONY MEDICAL, LLC, GA BIOSCIENCE RESEARCH, INC., WINDFLOWER BIOSCIENCE RESEARCH, INC., ASPIRE MEDICAL PARTNERS, LLC, SILVERLEAF HEALTH ALTERNATIVES INC., CUMBERLAND CURATIVES, LLC and ACC, LLC **Plaintiffs,** **v.** **GEORGIA DEPARTMENT OF ADMINISTRATIVE SERVICES and GEORGIA's ACCESS TO MEDICAL CANNABIS COMMISSION** **Defendants.**	**CIVIL ACTION FILE NO. _____**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Pure Peach Organic, Inc., ("Pure Peach"), Symphony Medical, LLC. ("Symphony"), GA Bioscience Research Inc. ("GABRI"), Windflower, Bioscience Research, Inc. ("Windflower"), Aspire Medical Partners, LLC ("Aspire"), Silverleaf Health Alternatives, Inc. ("Silverleaf"), Cumberland Curatives, LLC ("Cumberland") and ACC, LLC ("ACC") (Pure Peach, Symphony, GABRI, Windflower, Aspire, Silverleaf, Cumberland, and ACC shall be collectively referred to as "Plaintiffs") and pursuant to Georgia's Hope Act, O.C.G.A. § 16-12-200, *et. seq* ("Hope Act"), the State Purchasing Act, O.C.G.A. § 50-5-50 *et seq.* ("Purchasing Act"), including, but not limited to O.C.G.A. § 50-5-51 and O.C.G.A. § 50-5-79, the Rules and Regulations promulgated under the Georgia Procurement Manual ("Procurement Manual"), the

Open Records Act, O.C.G.A. § 50-18-70 *et seq.* ("ORA"), and general principles of law and file the instant action for declaratory and injunctive relief against the Georgia Department of Administrative Services ("DOAS") and the Georgia Access to Medical Cannabis Commission ("GMCC") (referred to collectively as "Defendants").

Parties

1. Plaintiffs Pure Peach, Symphony, GABRI, Windflower, and Silverleaf are each corporation formed under the laws of the State of Georgia and authorized to do business within the State of Georgia. Plaintiff Aspire is a limited liability company formed under the laws of the State of Georgia and it is authorized to do business within the State of Georgia.
2. DOAS is the Georgia state agency overseeing procurement for state and local governments.
3. The GMCC is the Georgia commission created to establish a system for the issuance of licenses to produce medicinal cannabis, to issue such licenses, and to thereafter regulate the medicinal cannabis industry.
4. All of the Defendants may be served at their respective government offices located within Fulton County, Georgia.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction of this action pursuant to O.C.G.A. § 50-5-79; Ga. Const. Art. I, § I, Para. I; Ga. Const. Art. I, § I, Para. II, O.C.G.A. § 50-18-73, and general principles of law.
6. This Court has personal jurisdiction over the Defendants and venue is proper Fulton County since both Defendants reside in Fulton County and the acts complained of occurred in Fulton County.

Statutory and Regulatory Background
The GMCC and The Hope Act

7. Georgia's Hope Act, O.C.G.A. § 16-12-200, *et. seq.* (the "Hope Act"), effective July 1, 2019, created the GMCC and authorized the GMCC to oversee the licensing of limited, in-state cultivation, production, manufacturing, and sale of low-THC oil as well as the dispensation of this oil to patients on the state's Low-THC Oil Registry.
8. The Hope Act authorizes the GMCC to issue no more than two Class 1 licenses and no more than four Class 2 licenses (collectively "Licenses") pursuant to contracts for the purposes stated in the Hope Act and as generally described in paragraph 7.
9. The only difference between a Class 1 License and a Class 2 License is the quantity of cannabis the license holder may produce, manufacture, and sell.
10. Each of the Plaintiffs is an unsuccessful applicant for one of the Licenses.
11. Although the Hope Act grants the GMCC authority to adopt rules and regulations as necessary to administer and enforce the Hope Act, the GMCC did not do so at any time relevant to this matter. O.C.G.A. § 16-12-203(14).
12. Pursuant to the Hope Act, the GMCC is required to grant initial Licenses through competitive sealed bids or competitive sealed proposals as provided for in the Purchasing Act, O.C.G.A. § 16-12-221(a).
13. Prior to awarding Licenses and entering into contracts, the Hope Act requires the GMCC to issue a notice of intent to award and to adopt a protest procedure pursuant to which unsuccessful applicants can protest the proposed awards, and, as discussed hereinafter, the GMCC did so.
14. The Hope Act provides that GMCC internal documents and documents submitted to the GMCC shall not be subject to the Georgia Open Records Act, O.C.G.A. § 50-18-70, *et. seq.*

("ORA"), but that "any contract, memorandum of understanding, or cooperative endeavor agreement entered into by the commission pursuant to this article shall be subject to Article 4 of Chapter 18 of Title 50 [the ORA]."

15. In other words, once the GMCC issues a Notice of Intent to Award Licenses, such internal documents and documents submitted to the GMCC would become subject to the ORA.

16. The ORA allows Prospective Licensees to redact trade secret information as defined by O.C.G.A. § 10-1-27 after attaching an affidavit affirmatively declaring that specific information in the records constitutes trade secret information and after the agency's individual determination that the redacted information contains trade secrets as defined by law.

The Application Process

17. The Procurement Manual requires that when a state entity such as the GMCC intends to award contracts through a bid or proposal process it must first publish a notice of intent to award a contract and allow other applicants to protest the proposed awards and the bidding/proposal process.

18. The Purchasing Act exempts bids and proposals for state contracts from the ORA during the initial bid or proposal contracting phase, but, critically, the Purchasing Act expressly states that once a NOIA is issued, the documents relating to the bid or proposal process and the award process are subject to the ORA. O.C.G.A. § 50-5-67(d) (4) and (5).

19. Under authority granted by the Hope Act, the GMCC issued a Request for Proposals ("RFP") for Class 1 and Class 2 Production Licenses on November 23, 2020, and at the same time published identical Application Instructions for the issuance of Class 1 and Class 2 Licenses ("Application Instructions") and Protest Procedures.

20. As required by the Hope Act, the Application Instructions issued by the GMCC state that the application and award process will be conducted in accordance with the Purchasing Act.
21. As also required by the Hope Act and the Purchasing Act, the Application Instructions provide for the issuance of a notice of intent to award (the "NOIA"), as well as Post-Award Protest Procedures ("Protest Procedures").
22. With the submission of a proposal for a License, each applicant was required to sign a contract ("Contract") and the Contract states that the applicant's proposal will be incorporated into the Contract.
23. Consistent with the requirements of the Hope Act and the Purchasing Act, the Application Instructions state that at the same time, the GMCC issues a NOIA it will also disclose the applicant signed Contracts of the Prospective Licensees, redacted consistent with the ORA. Application Instructions, Item 8.
24. The Application Instructions required applicants to submit two (2) copies of their application—one unredacted copy and one copy "redacted in accordance with the [ORA]."
25. Notwithstanding that the Application Instructions, the Hope Act and the Purchasing Act require that License applications redacted consistent with the ORA be issued with the NOIA, all but one of the entities identified as a successful applicant in the NOIA ("Prospective Licensees") submitted applications redacted of information far in excess of what is permitted under the ORA, including, in some cases, all substantive information, totaling hundreds of pages and in the case of at least one licensee over a thousand pages.
26. On July 24, 2021, the GMCC issued a "NOIA" listing Prospective Licensees as follows: Class 1 Licenses Botanical Sciences, LLC and Trulieve, GA, Inc.; and Class 2 licenses FFD GA

Holdings, LLC ("FFD"), TheraTrue Georgia, LLC ("TheraTrue"), Natures GA, LLC, ("Natures") and Treevana Remedy, Inc., ("Treevana").

27. When it issued the NOIA the GMCC also published the Prospective Licensees' applications, with grossly excessive redactions far in excess of what may be redacted under the ORA, and their signed Contracts.

28. At no time has the GMCC required Prospective Licensees to submit their applications redacted consistent with the ORA, in direct contravention of the Hope Act, the Purchasing Act, and the Application Instructions.

The Protest Process

29. Under the Protest Procedures, for a protest to succeed, a protester must "…demonstrate a reasonable likelihood of competitive prejudice; in effect, but for the Cannabis Commission's actions, the protesting party would have had a substantial chance of receiving an award."

30. Because an unsuccessful applicant is required to show competitive harm to successfully protest the NOIA, it is very difficult for a protester to meet its burden of proof without comparing its application to those of the Prospective Licensees.

31. The Protest Procedures require that within seven days of issuance of the NOIA, unsuccessful applicants wishing to protest the NOIA submit a written protest, including "the factual and legal bases for the protest, supporting exhibits, evidence, or documents to substantiate any claims" ("Grounds for Protest").

32. None of the protesters, including, but not limited to, the Plaintiffs herein, could submit complete Grounds for Protest and it was very difficult for them to meet their burden of proof to show competitive harm because the applications as released were so excessively redacted.

33. Both informally and through requests under the ORA, protesters individually requested the GMCC to disclose the Prospective Licensees' applications redacted consistent with the ORA—as required by the Application Instructions, the Hope Act, and the Purchasing Act—as well as other information and documents related to the evaluation and scoring process, but the GMCC refused all such requests.

34. Notwithstanding the GMCC's refusal to provide the Plaintiffs with any information or documents other than excessively redacted applications that violate the ORA, the Plaintiffs learned that the GMCC violated numerous standard evaluation and scoring methodologies during the evaluation process.

35. Although the GMCC has and continues to refuse to disclose its commissioners' conflict of interest disclosure forms, it is upon information and belief that GMCC commission members responsible for scoring applications and awarding Licenses had significant conflicts of interest rendering their participation in the process improper and unlawful under the Procurement Manual's clear prohibition upon evaluator conflicts of interest.

36. Notwithstanding the GMCC's refusal to disclose internal documents relating to the evaluation and scoring procedures or the Prospective Licensees' applications redacted only for trade secret information as permitted by the ORA, each of the Plaintiffs filed a timely protest (collectively "Protests").

37. Months after the Protests were filed, the GMCC transferred its power to hear the Protests to the Office of State Administrative Hearings ("OSAH") with direction for OSAH to hear and decide the Protests under the GMCC's Protest Procedures.

38. OSAH designated administrative law Judge Stephanie J. Howells as the hearing officer for the Protest Procedures.

39. After the Protests were transferred to OSAH the Plaintiffs again attempted to obtain the Prospective Licensees' applications redacted consistent with the ORA, but, like the GMCC, Judge Howells refused these requests.

40. Just a few weeks before the Plaintiffs' respective protest hearings, Judge Howells issued Orders providing each Plaintiff with limited and insufficient access to limited parts of the Prospective Licensees' applications.

41. The limited access granted by Judge Howells was also insufficient in that (a) access was granted just days to a few weeks before each Plaintiff's respective protest hearing leaving little time to prepare; (b) access was allowed for only 10 days; (c) access was only allowed on a secure server and Plaintiffs' counsel were prohibited from reproducing anything, making it very difficult for Plaintiffs to meaningfully compare applications; (e) no protestor was permitted access to all topical sections of the Prospective Licensees' applications but rather Judge Howells arbitrarily chose which topical sections of the Prospective Licensees' applications that each protestor would be permitted to view; and, critically; (e) access was granted for attorneys' eyes only, rendering the review almost meaningless as counsel are not experts in the cannabis industry and without the ability to share the applications with clients or outside experts in the medical cannabis industry, they were ill equipped to identify most errors in the evaluation and scoring process.

DOAS' Unlawful Blanket Exemption from the Procurement Manual and Purchasing Act

42. DOAS is responsible for administering purchases made by the state of Georgia subject to the Purchasing Act.

43. In administering the Purchasing Act, DOAS has promulgated comprehensive rules and regulations governing state purchasing activities, which rules and regulations are set forth in the Procurement Manual. Procurement Manual §§ I.1, I.1.1.

44. A procurement officer may seek a deviation from specified rules or procedures set forth in the Procurement Manual.

45. The Procurement Manual provides that when a procurement officer desires to deviate from a specific rule or regulation set forth in the Procurement Manual, the procurement officer should first make a written request for the deviation to the State Purchasing Division Deputy Commissioner, explaining "the nature of the deviation" the "reasons why a deviation is necessary" and why the deviation "is in the best interest of the State of Georgia." Procurement Manual § I.2.7.

46. Days before the Plaintiffs' protest hearings were to begin, the Plaintiffs learned through a third party that prior to evaluating and scoring applications, the GMCC had sought such a deviation from DOAS.

47. Without identifying a specific rule or regulation for which context-specific deviation was necessary or in the best interest of the state, and without offering any explanation of any kind to justify its request, the GMCC asked DOAS to grant the GMCC blanket authority to deviate from and wholly disregard **all** rules and procedures set out in the Purchasing Act and the Procurement Manual.

48. Astonishingly, DOAS gave the newly formed state commission overseeing a federally regulated medicinal substance, the green light to ignore the conflict of interest, application, evaluation, scoring, and awards rules and procedures that have standardized and legitimized state contracts across trades for decades.

49. On September 16, 2022, Judge Howells issued a Final Decision in each of the Plaintiffs' protest proceedings, denying all protests in full, refusing to grant any relief, affirming the GMCC's denial of licenses to each of the Plaintiffs, and affirming the GMCC's intention to award Licenses to the Prospective Licensees, without analysis or consideration of Plaintiffs' claims under the Hope Act, the Purchasing Act, the Procurement Manual, the ORA, the Application Rules, the Protest Procedures, or, critically, DOAS' blank check to deviate from the Procurement Manual and Purchasing Act's rules and procedures governing state purchases.

COUNT I

Violation of the Purchasing Act and the Procurement Manual (DOAS)

50. Plaintiffs incorporate the allegations of paragraphs 1- 49 as if fully set forth herein.

51. The Hope Act required the GMCC to issue initial medical cannabis licenses pursuant to the Purchasing Act. O.C.G.A. § 16-12-221(a).

52. The Procurement Manual, issued under the authority granted by the Purchasing Act, sets out required procedures governing all state procurement processes.

53. DOAS violated the Purchasing Act and the Procurement Manual, and acted arbitrarily and capriciously, by granting the GMCC a blanket exemption from standard rules and procedures without requiring the Prospective Licensees to comply with any of the requirements the Procurement Manual mandates before a state entity may deviate from the standard rules and procedures as described above.

54. An administrative rule which exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated is invalid. The DOAS' grant of authority to the GMCC to

wholly deviate from the Purchasing Act and Procurement Manual is unreasonable and exceeds the scope of the DOAS' authority to issue deviation authority and is therefore invalid.

55. Plaintiffs were competitively disadvantaged by DOAS and the GMCC's conduct as described above.

WHEREFORE, the Plaintiffs request the Court grant the following relief:

a. A declaratory judgment that DOAS abused its discretion and acted arbitrarily and capriciously in granting the GMCC a blanket deviation from the rules and procedures set out in the Procurement Manual;

b. A declaratory judgment that the NOIA, including the Licenses and contract awards proposed therein, were improperly issued and that the Class 2 Licenses and contracts proposed in the NOIA may not be issued

c. An order rescinding any Licenses issued by the GMCC and any contracts between the GMCC and any Prospective Licensee;

d. Recovery by each Plaintiff of all costs incurred in preparing their respective applications for a License and costs of litigation; and

e. Award Plaintiffs such other and further relief as it deems just and proper.

COUNT 2

Violation of the Hope Act, the State Purchasing Act, the Procurement Manual, and the GMCC's Application Instructions and Protest Procedures (GMCC)

56. Plaintiffs incorporate the allegations of paragraphs 1- 55 as if fully set forth herein.

57. The GMCC abused its discretion and acted arbitrarily and capriciously in violation of the Hope Act, the Purchasing Act, the Procurement Manual, and the GMCC's Application Instructions and Protest Procedures by, among other things, (a) requesting and obtaining a blanket deviation knowing such deviation was granted in violation of law; (b) failing to follow

standard evaluation and scoring methodologies; (c) issuing the NOIA pursuant to a process that violated the aforementioned laws and procedures; (d) allowing Commissioners who had disqualifying conflicts of interest to participate in the evaluation and award process in violation of the Georgia Code of Ethics for Government Service, O.C.G.A. § 45-10-1 *et. seq.*; and (e) refusing to disclose documents it was required to disclose pursuant to the aforementioned laws, all of which precluded Plaintiffs from lodging meaningful protests.

58. Plaintiffs were competitively disadvantaged by the GMCC's actions, including, but not limited to those set out above.

WHEREFORE, the Plaintiffs respectfully request the Court grant the following relief:

a. Enter a declaratory judgment that:

(1) The GMCC abused its discretion and acted arbitrarily and capriciously and in violation of the Purchasing Act and the rules promulgated thereunder, including the Procurement Manual by (a) seeking and obtaining a blanket deviation from established rules and procedures; (b) failing to follow standard evaluation and scoring methodologies; (c) issuing the NOIA pursuant to a process that violated the Hope Act, the Purchasing Act, the Procurement Manual, the ORA, and the Application Instructions and Protests Procedures; (d) allowing Commissioners who had disqualifying conflicts of interest to participate in the evaluation and award process; and (e) failing to disclose documents it was required to disclose.

(2) The actions of the GMCC materially disadvantaged Plaintiffs in the proposal and licensing process;

(3) The Notice of Award to the Class II prospective licensees are null and void,

(4) The Class 1 licenses and contracts awarded were improperly awarded and are thus null and void;

b. Plaintiffs be awarded all costs incurred in preparing their respective applications for a License and costs of litigation; and

c. Award Plaintiffs such other and further relief as it deems just and proper.

COUNT 3

Violation of the Georgia Open Records Act (GMCC)

59. Plaintiffs incorporate paragraphs 1- 58 as if fully set forth herein.

60. The ORA requires the disclosure of all documents maintained or received by a government agency, including commissions such as the GMCC, except where expressly excepted by law. O.C.G.A. § 50-18-70.

61. Under the Hope Act, upon issuance of the NOIA documents created or obtained by the GMCC, including without limitation applications for Licenses and GMCC documents relating to the application and award process were subject to disclosure under the ORA. O.C.G.A. § 16-12-220.

62. In addition to requesting the GMCC and Judge Howells to disclose the Prospective Licensees' applications and GMCC's internal documents relating to the application and licensing process and commissioners' conflict of interest forms following the publication of the NOIA, one or more Plaintiffs requested such disclosure pursuant to and consistent with the ORA.

63. The GMCC repeatedly refused to disclose such documents, incorrectly claiming they were exempt from disclosure pursuant to the Hope Act.

64. Plaintiffs were competitively disadvantaged by the GMCC's violation of the ORA, including, but not limited to, because they were unable to meaningfully protest the GMCC's proposed awards as set out in the NOIA.

WHEREFORE, the Plaintiffs respectfully request the Court to grant the following relief:

a. Enter a declaratory judgment that:

(1) The GMCC violated the ORA;

(2) The actions of the GMCC materially disadvantaged Plaintiffs in the proposal and licensing process;

(3) The GMCC's violation of the ORA infected the entire application and award process and precluded Plaintiffs from lodging a meaningful protest;

(4) As a result of the GMCC's violations, the proposed Class 2 license awards are null and void and the grant of Class 1 Licenses must be revoked the contracts if any signed with any Prospective Licensee must be rescinded;

(5) The GMCC must publicly disclose all applications for a cannabis license pursuant to the Hope Act and all internal GMCC documents required to be disclosed under the ORA;

b. Each Plaintiff who filed a request for documents under the ORA be awarded all costs incurred in preparing their respective applications for a License and costs of litigation; and

c. Award Plaintiffs such other and further relief as it deems just and proper.

COUNT 4

The GMCC Violated the Code of Ethics for Governmental Service (GMCC)

65. Plaintiffs incorporate paragraphs 1- 64 as if fully set forth herein.

66. Upon information and belief, one or more GMCC commissioners had personal or institutional conflicts of interest as defined by the Georgia Code of Ethics and Conflicts of Interest that prohibited them from participating in the evaluation of applications for Licenses and all decisions relating to such evaluations and awards. O.C.G.A. § 45-10-3.

67. The participation of one or more commissioners in the evaluation and award process notwithstanding the conflicts of interest believed to exist materially disadvantaged Plaintiffs.

68. The participation of one or more commissioners in the evaluation and award process notwithstanding the conflicts of interest believed to exist tainted the process as a whole and requires that the NOIA be declared null and void.

WHEREFORE, the Plaintiffs respectfully request the Court grant the following relief:

a. A declaratory judgment that allowing one or more GMCC commissioners to participate in evaluating and scoring applications for Licenses when they had conflicts of interest that violated the Code was arbitrary and capricious;

b. Recovery by each Plaintiff of all costs incurred in preparing their respective applications for a License and costs of litigation; and

c. Award Plaintiff such other and further relief as it deems just and proper.

COUNT 5

Injunctive Relief (GMCC)

69. Plaintiffs incorporate paragraphs 1- 68 as if fully set forth herein.

70. The manner in which the GMCC evaluated license applications, its award of licenses and entry into contracts for Class 1 licenses and its proposal to award Class 2 licenses as reflected in the NOIA was unlawful and infused with fraud and corruption such that Plaintiffs had no chance of winning such licenses and contracts based upon merit.

71. The GMCC's and OSHA's conduct in connection with the protest process was similarly unlawful and infused with fraud and corruption making it very difficult for any Plaintiff to prosecute a meaningful protest and to meet their burden of proof in the protest process.

72. The GMCC is likely to continue the wrongful conduct in connection with the award of licenses and contracts in the future, including, but not limited to, by proceeding with the award of Licenses and signing of contracts with the Class 2 Prospective Licensees and by permitting the Class 1 Prospective Licensees to begin operations.

73. Plaintiffs have no adequate remedy at law to protect against wrongful conduct in the award of Licenses and contracts by the GMCC.

74. There is a likelihood that Plaintiff will succeed on the merits of its action against the GMCC and DOAS.

75. If the Court does not grant the relief sought, the Plaintiffs will suffer irreparable injury, loss, or damage before final disposition of this action.

76. The risk of irreparable harm to Plaintiff in the absence of relief outweighs any potential harm to the nonmoving parties.

WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

(a) A preliminary injunction and thereafter a permanent injunction against the GMCC and its commissioners, employees, agents, and successors prohibiting it and them from awarding any license or contract to the Class 2 Prospective Licensees unless and until a licensing and

award process consistent with all applicable laws, including, but not limited to, the Hope Act, the State Purchasing Act, the Procurement Manual, and the ORA, as well as all GMCC rules and procedures have been completed;

(b) A preliminary injunction and thereafter a permanent injunction against the GMCC and its commissioners, employees, agents, and successors requiring it and them to revoke the Class 1 licenses that have been granted and prohibiting it and them from allowing any person or entity to begin operations under such licenses;

(c) A preliminary injunction and thereafter a permanent injunction against the GMCC and its commissioners, employees, agents, and successors from illegally discriminating against Plaintiffs based on political favoritism in the bidding, awarding, extending, and renewing of any license or contract pursuant to the Hope Act;

(d) Award Plaintiffs such other and further relief as it deems just and proper.

FINAL PRAYER FOR RELIEF

WHEREFORE Plaintiffs request that this Court enter judgment as follows:

a) Take jurisdiction of this matter;

b) Grant all relief requested in Counts 1 through 5 of this Complaint; and

c) Retain jurisdiction of the case after the award of any injunction, for such period of time as the Court may deem necessary, and take all steps necessary to ensure compliance with any injunction;

d) Grant a trial by jury on all issues as to which trial by jury is guaranteed by the Constitution; and

e) Award Plaintiff such other and further relief as it deems just and proper.

This **14th** day of February 2023

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Attorneys for ACC, LLC

TAB 13

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

GEORGIA FIRST AMENDMENT FOUNDATION, Appellant, v. REVOLUTION GEORGIA LLC, ASPIRE MEDICAL PARTNERS LLC, GA BIOSCIENCE RESEARCH INC., CURALEAF GA HOLDINGS LLC, PEACH STATE MEDICINALS LLC, PURE BEAUTY GA LLC, CUMBERLAND CURATIVE LLC, SYMPHONY MEDICAL LLC, PURE PEACH ORGANIC INC., ACC LLC, PEACH HEALTH ALTERNATIVES LLC, HARVEST CONNECT LLC, SILVERLEAF HEALTH ALTERNATIVES INC., and REMEDIUM LIFE SCIENCE OF GEORGIA LLC, Plaintiff-Respondents, and FFD GA HOLDINGS, LLC; THERATRUE GEORGIA, LLC; NATURES GA, LLC; and TREEVANA REMEDY, INC., Defendant-Respondents.	Application No. A23D0265 Fulton Co. Superior Court Civil Action File No. 2022 CV 370799

THE GEORGIA FIRST AMENDMENT FOUNDATION'S
NOTICE OF INTENTION TO APPLY FOR CERTIORARI

To: Clerk
Court of Appeals of the State of Georgia
330 Capitol Ave., S.E.
1st Floor, Suite 1601
Atlanta, Georgia 30334

Pursuant to Georgia Court of Appeals Rule 38, notice is hereby given that the Georgia First Amendment Foundation intends to apply to the Supreme Court of Georgia for a writ of certiorari to review the judgment of the Court of Appeals rendered in the above-captioned matter on April 10, 2023.

This 13th day of April, 2023.

/s/ Joy Ramsingh
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Admitted Pro Hac Vice
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Counsel for the Georgia First Amendment Foundation

CERTIFICATE OF SERVICE

Pursuant to O.C.G.A. § 5-6-32 (a) and Ga. Court of Appeals Rule 6, at or prior to filing, I have served a copy of the foregoing via mail on this the 13th day of April, 2023, upon the following:

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Atlanta, GA, 30303

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Registered Agents Inc.
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Pure Beauty GA, LLC
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Pursuant to Ga. Court of Appeals Rule 6, I certify that there is a prior agreement with the parties listed below to allow PDF documents sent via email to suffice for service in this matter. Accordingly, I have served a copy of the foregoing via email on this the 13th day of April, 2023, upon:

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