NO. 101215-2

SUPREME COURT OF THE STATE OF WASHINGTON

VISION RESEARCH GROUP, LLC,

Petitioner,

v.

WASHINGTON STATE LIQUOR
AND CANNABIS BOARD,

Respondent.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
Attorney General

SUSIE GILES-KLEIN
Assistant Attorney General
WSBA# 46608
Assistant Attorney General
Attorneys for Washington State
Liquor and Cannabis Board
1125 Washington Street SE
Olympia, WA 98504-0100
(360) 586-6055

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUE 3

III. STATEMENT OF THE CASE 3

A. The Undisputed Facts Established by the Parties' Cross Motions for Summary Judgment 3

1. VRG's Priority System Application 4

2. The Legislature's Repeal of the Priority System in 2017 and Implementation of the Social Equity Program in 2020 6

B. VRG's Appeal and the Parties' Cross Motions for Summary Judgment 6

C. The Court of Appeals' Decision Affirming the Board's Final Order Exclusively on Questions of Law 9

IV. REASONS FOR DENYING REVIEW 11

A. The Court of Appeals Acted Consistent with Precedent When It Declined To Apply Substantial Evidence Review To Undisputed Facts 12

1. The facts of the case are undisputed 13

2. Since the Final Order was based on undisputed facts, the Court of Appeals followed settled precedent when it affirmed the Final Order as a matter of law 15

3. Under settled precedent, the Court of Appeals was not required to apply substantial evidence review to the Board's Final Order and Statement of Intent 19

a. No authority supports requiring reviewing courts to apply substantial evidence review to agency orders based on undisputed facts 20

b. The Statement of Intent to Withdraw is not subject to any of the judicial review provisions of the APA, including substantial evidence review. 24

4. The Board's Final Order is supported by undisputed substantial evidence 25

B. The Court of Appeals' Opinion Presents No Questions of Substantial Public Interest 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

ARCO Prod. Co. v. Utilities & Transp. Comm'n
125 Wn. 2d 805, 888 P.2d 728 (1995)..... 26

City of Redmond v. Cent. Puget Sound Growth Mgmt Hearings Bd.
136 Wn.2d 38, 959 P.2d 1091 (1998)..... 26

City of Univ. Place v. McGuire
144 Wn.2d 640, 30 P.3d 453 (2001)..... 26

Lee's Drywall Co. v. State, Dep't of Lab. & Indus.
141 Wn. App. 859, 173 P.3d 934 (2007)..... 17

Lemire v. Dep't of Ecology, No. 09-159
2010 WL 4390114, at *2 (Wash. Pollution Control Hr'gs Bd. Oct. 27, 2010)..... 21

Lemire v. State, Department of Ecology
178 Wn.2d 227, 309 P.3d 395 (2013)..... 20, 21

Osborn v. Mason Cnty
157 Wn.2d 18, 134 P.3d 197 (2006)..... 16

Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.
189 Wn. App. 127, 356 P.3d 753 (2015)..... 16, 20

Seattle 420, LLC v. State Liquor & Cannabis Bd.
18 Wn. App. 2d 1020, *rev. denied*, 198 Wn.2d 1027, 498 P.3d 956 (2021)..... 16

Southwick, Inc. v. State
200 Wn. App. 890, 403 P.3d 934, (2017), *aff'd,* 191 Wn.2d 689, 426 P.3d 693 (2018)..... 12, 20, 22, 23

Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.
176 Wn. App. 555, 309 P.3d 673 (2013)..... 26

Verizon Nw., Inc. v. Emp't Sec. Dep't
164 Wn.2d 909, 194 P.3d 255 (2008)..... 12, 16, 20, 21

Vision Research Group, LLC v. Washington State Liquor and Cannabis Board, No. 55576-0-II
2022 WL 2236170 (Wash. Ct. App. June 22, 2022) (unpublished) ..... passim

Statutes

E2SHB 2870..... 6

Laws of 2013, ch. 3 (*codified in part in* RCW 69.50) 3

Laws of 2015, ch. 70, § 6, *amending* RCW 69.50.331 3

Laws of 2017, ch. 317, § 2 6

Laws of 2020, ch. 236, § 2 6

RCW 34.05.461(1)(a)..... 24

RCW 34.05.570(3) 24, 25

RCW 45.05.570(3)(e)..... 25

RCW 69.50.331 (former) 4, 8

RCW 69.50.331(1) 2, 17

RCW 69.50.335 ..... 6, 28

RCW 69.50.354 ..... 2, 18

Rules

GR 14.1 29

RAP 13.4(b) 11, 30

RAP 13.4(b)(1) 11, 13, 28

RAP 13.4(b)(4) 11

RAP 13.4(b)(4) 28, 30

Regulations

WAC 314.55.020 (former) 4

WAC 314-55-050 ..... 2, 18

WAC 314-55-050(17) 6

WAC 314-55-160(2)(b)(ii) 24

WAC 314-55-165(2) 24

I. INTRODUCTION

Vision Research Group's (VRG's) eleventh-hour attempt to create a question of fact, as a means to persuade this Court to review this matter, should be disregarded. Despite VRG's protestations to the contrary, the facts of this case are *undisputed*. This is evident from the parties' cross-motions for summary judgment, as well as the Liquor and Cannabis Board's adoption of all factual findings from the Initial Order—findings VRG admittedly agrees with. Clerk's Papers (CP) 79. Since the facts are uncontested, the Court of Appeals acted consistent with precedent when it declined to apply substantial evidence review to the Board's Final Order cancelling VRG's application for a cannabis retail license.

VRG misleadingly implies that the Court reached its decision in this case only *after* concluding it could not engage in substantial evidence review. Petition at 2. This is untrue, as the Court affirmed the Final Order de novo on three distinct legal grounds. First, the Court concluded that

RCW 69.50.331(1), which requires the Board to conduct a "comprehensive, fair, and impartial evaluation" of all timely-received applications, was satisfied when the Board evaluated and sorted VRG's application as required by the now-repealed Priority System.[1] Next, the Court found that, given the undisputed facts of the case, the Board properly exercised its statutory authority under WAC 314-55-050 and RCW 69.50.354 when it cancelled VRG's application for a cannabis retail license. Finally, the Court determined that the Board's Final Order was not arbitrary or capricious. *Vision Research Group, LLC v. Washington State Liquor and Cannabis Board*, No. 55576-0-II, 2022 WL 2236170, at *___ (Wash. Ct. App. June 22, 2022) (unpublished). .

Thus, the Court reviewed the undisputed facts and relevant law, followed precedent by applying de novo review, and affirmed the Final Order. Because VRG's Petition for

[1] *See* former RCW 69.50.331 and former WAC 314.55.020.

Review does not meet any of the criteria in RAP 13.4(b), this Court should deny discretionary review.

II. STATEMENT OF THE ISSUE

Did the Court of Appeals correctly affirm the Board's Final Order cancelling VRG's application for a cannabis retail license, where it found the Board's action was a valid exercise of its statutory authority?

III. STATEMENT OF THE CASE

A. The Undisputed Facts Established by the Parties' Cross Motions for Summary Judgment

In 2012, Washington voters approved Initiative 502, which legalized recreational cannabis in the state.[2] In 2015, the Legislature passed a law requiring the Board to implement a Priority System for processing applications for cannabis retail licenses.[3] That same year, the Board announced it would increase the total number of retail licenses by 222, resulting in a

---

[2] *See* Laws of 2013, ch. 3 (*codified in part in* RCW 69.50).

[3] *See* Laws of 2015, ch. 70, § 6, at 294-95, *amending* RCW 69.50.331.

new statewide cap of 556 licenses. Administrative Record (AR) at 182, 192, and 345. The Board determined that 556 is the maximum number of stores it can safely license and regulate – it is not a minimum number, and no law or rule requires the Board to issue all 556 licenses at a given time. AR 180, AR 346.

1. VRG's Priority System Application

Under the Priority System, the Board was directed to evaluate and sort all cannabis retail applications as Priority 1, 2, or 3.[4] The window during which the Board accepted applications lasted from October 12, 2015 to March 31, 2016. AR 180, AR 345. On March 29, 2016, VRG submitted an application for a retail license. AR 185.

During the application window, the Board received 2,340 applications for 222 available licenses. AR 180, 345. Of these applications, 290 qualified as Priority 1, including VRG.

[4] *See* former RCW 69.50.331 and former WAC 314.55.020.

AR 180, 190, 345. Because the Board processed Priority 1 applications in the order in which they were received, and because VRG waited until two days before the application deadline to submit its materials, the Board issued all 222 available licenses to Priority 1 applicants who submitted their materials prior to VRG. AR 180-181, 345-346.[5]

After the close of the application window, a number of retail licensees relinquished their licenses to the Board by going out of business or having their licenses revoked.[6] AR 148, 346. The number of unissued licenses fluctuates at any given time. AR 148, 346. Though the number of licensed retailers is currently below the statewide cap, the Board has determined that issuing additional licenses is not in the best interest of the

[5] Because all 222 licenses went to Priority 1 applicants, no licenses were available for Priority 2 or 3 applicants. AR 181, 345.

[6] This number may include licenses issued under the Lottery System, which was supplanted by the Priority System in 2015.

welfare, health, or safety of the people in the state. WAC 314-55-050(17); AR 148, 182, 346.

2. The Legislature's Repeal of the Priority System in 2017 and Implementation of the Social Equity Program in 2020

In 2017, the Legislature repealed the Priority System.[7] At the time of the repeal, the Board had already distributed all 222 licenses it intended to issue under that System. AR 181, 345-346. In 2020, the Legislature adopted E2SHB 2870, which authorized the "issuance and reissuance" of existing cannabis retail licenses under a Cannabis Social Equity Program.[8] Currently, the Board is neither accepting applications nor issuing retail licenses to any pending applicants. AR 182. [9]

B. VRG's Appeal and the Parties' Cross Motions for Summary Judgment

In May of 2019, following the repeal of the Priority System, the Board informed all Priority 1 applicants that,

---

[7] *See* Laws of 2017, ch. 317, § 2, at 1316-17.

[8] *See* Laws of 2020, ch. 236, § 2; RCW 69.50.335.

[9] *See* https://lcb.wa.gov/cannabis-license/cannabis-licensing (last visited on 10/28/2022))

because it had completed issuing licenses for cannabis retailers, their applications would be administratively withdrawn. AR 182, 195, 347. The Board issued VRG a Statement of Intent to Withdraw, which outlined its reasons for the proposed cancellation. AR 182, 199, 347. VRG appealed this decision to the Board, and the matter was sent to the Office of Administrative Hearings to be heard by an Administrative Law Judge (ALJ).

The parties conducted discovery and filed cross-motions for summary judgment. AR 114, 131. The cross-motions were based on undisputed facts, including: (1) the Board received 290 Priority 1 applications for 222 available licenses; (2) the Board processed applications in the order they were received; (3) the Board issued 222 Priority System licenses to Priority 1 applicants who applied earlier than VRG; (4) the Priority System was repealed in 2017; (5) the number of unissued licenses retained by the Board fluctuates; (6) the number of licensed stores is currently below 556; and (7) the Board is not

required to issue all 556 licenses at a given time. AR 345-346. Based on these uncontested facts, the ALJ decided that, *as a matter of law*, the Board lacked the authority to cancel VRG's application and issued an Initial Order granting VRG's motion. AR 351.

Upon reviewing the full evidentiary record, the Board reversed the ALJ's Initial Order and reinstated the cancellation of VRG's application. AR 387-93. Notably, the Board's Final Order adopts *all* the Findings of Fact of the Initial Order. AR 388 – 391. Based on the uncontested facts established by the parties, the Board determined that, *as a matter of law* (1) VRG received a "comprehensive, fair, and impartial evaluation" as required by RCW 69.50.331 when it was evaluated and sorted into Priority 1; (2) when the Priority System was repealed, the legislature did not establish new licensing criteria nor did it make an explicit provision concerning the disposition of pending applications; (3) the Board received 290 Priority 1 applications, and issued its 222

available licenses to applicants who submitted their materials prior to VRG; and (4) following the repeal of the Priority System, the Board exercised proper authority in cancelling all pending Priority System applications. *Id.*

VRG filed a petition for judicial review in Thurston County Superior Court. In its Petition, VRG specifically asked the superior court to "concur" with the factual findings of the Initial Order – findings that were adopted in their entirety in the Board's Final Order. CP 79, AR 388-391. The superior court reversed the Final Order and found that the Order was, among other things, "not supported by substantial evidence." The superior court did not offer any discussion or analysis related to its conclusion, nor did it identify any disputed findings of fact. CP 157-159.

C. The Court of Appeals' Decision Affirming the Board's Final Order Exclusively on Questions of Law

The Board appealed the superior court's decision to the Court of Appeals, arguing that, as a matter of law: (1) the case was moot due to the repeal of the Priority System and adoption

of the Social Equity Program, and (2) the Board acted within its statutory authority in cancelling VRG's application. Opinion at 2. VRG responded, contending that: (1) the case was not moot, (2) the Board's cancellation of VRG's application was beyond its statutory authority, and (3) the Board's Statement of Intent failed to identify a valid legal basis for cancelling VRG's application. *Id.* Though both parties briefly mentioned substantial evidence in briefing, neither party emphasized substantial evidence review as crucial to its case nor incorporated it into their oral arguments.

In an unpublished opinion, the Court of Appeals reversed the superior court and affirmed the Final Order. The Court found that VRG's case was not moot. On the merits, the Court concluded that, given the facts of the case, the Board's decision to cancel VRG's application was a proper exercise of its statutory authority. Opinion at 11, 13-21. Since the facts were uncontested, having been determined via cross-motions for

summary judgment, the Court declined to engage in substantial evidence review. Opinion, fn. 9, p. 19.

VRG moved for reconsideration, arguing for the first time that there existed "hotly disputed issues of fact" requiring the Court to engage in substantial evidence review of the Final Order. Motion for Reconsideration at 3. The Court denied VRG's motion.

IV. REASONS FOR DENYING REVIEW

VRG urges review under two prongs of RAP 13.4(b), asserting that the Court of Appeals decisions conflicts with this Court's precedent and/or involves an issue of substantial public interest under RAP 13.4(b)(1) and (4).

VRG fails to establish a basis for review. The Court of Appeals' unpublished decision is not in conflict with precedent, nor does it present an issue of substantial public interest. Because VRG has failed to satisfy any of the four factors in RAP 13.4(b), VRG's Petition should be denied.

A. The Court of Appeals Acted Consistent with Precedent When It Declined To Apply Substantial Evidence Review To Undisputed Facts

The Court of Appeals followed settled precedent when it: (1) applied de novo review to an agency order based on a summary judgment decision, and (2) declined to apply substantial evidence review where only questions of law remained. *See,* e.g. *Verizon Nw., Inc. v. Emp't Sec. Dep't,* 164 Wn.2d 909, 916, 194 P.3d 255 (2008); *Southwick, Inc. v. State*, 200 Wn. App. 890, 892, 403 P.3d 934, 936 (2017), *aff'd,* 191 Wn.2d 689, 426 P.3d 693 (2018).

VRG's contention that the Court ignored the agency record is without foundation. The Opinion demonstrates that the Court reviewed the uncontested facts of the record, applied the facts to the law de novo, and ruled in the Board's favor. Opinion at 14, 19 ("Under these *facts*, WSLCB correctly exercised its broad authority to withdraw VRG's application.") (emphasis added). Moreover, none of the allegedly disputed "facts" identified by VRG are actually disputed (or even

relevant). Thus, VRG has not shown that this Court's review is warranted under RAP 13.4(b)(1).

1. The facts of the case are undisputed

VRG's last minute challenge to the factual record in this case is simply a replication of its argument that the Board's Statement of Intent and/or Final Order somehow rests on "unsupported" factual findings. *See, e.g.,* VRG's Response Brief at 21-22. These allegations were considered and rejected by the Court of Appeals, which found that "VRG presented no evidence that suggests that the WSLCB did not act with honesty and upon due discretion." Opinion at 20.

At its core, VRG's "substantial evidence" argument rests on the premise that, since the Board has not issued all licenses it is authorized to issue, the Final Order's conclusion that it issued all 222 licenses intended for Priority System applicants is somehow "false." Petition at 27-29. Specifically, VRG argues that the Board's Finding that it "issued all of the available licenses to applicants prior to VRG; thus, there were no more

licenses available to be issued to VRG" is a departure from the ALJ's Findings of Fact. *Id.*, AR 390.

VRG is incorrect. First, the ALJ *specifically found:* "Because other applicants completed the licensing process before VRG, [the Board] awarded the available licenses to other applicants, and thus, there was not a license available at that time for VRG to receive." AR 345-346. This is plainly not in conflict with the Board's identical finding. Second, the Board never disputed that it has not issued all the licenses it is authorized to issue—indeed, it provided VRG with this information. AR 148, 346. However, it is also undisputed that the Board is not *required* to issue all licenses at a given time, and that the number of available licenses fluctuates. AR 346. Thus, despite VRG's insistence that the Final Order rests on contradictory or unsupported facts, VRG does not identify a single fact that actually departs from the ALJ's factual findings it claims to agree with.

Finally, VRG's assertion that the Court "refused" to review the underlying factual record is a misreading of the Court's Opinion. Petition at 13. Not only are the facts undisputed, they were *specifically referenced* by the Court in its analysis. *See, e.g.*, Opinion at 4 ("the number of licensed cannabis retailers fell below the cap of 556 and continues to be below that number as of the time of this appeal"); Opinion at 19 ("The application period had closed, and WSLCB had issued all the retail licenses it intended to issue.") Thus, the plain language of the Opinion disproves VRG's accusation that the Court of Appeals ignored the factual record.

2. Since the Final Order was based on undisputed facts, the Court of Appeals followed settled precedent when it affirmed the Final Order as a matter of law

As discussed above, the Board's Final Order fully adopted the undisputed Findings of Fact established in the Initial Order on Cross-Motions for Summary Judgment. *See* AR 388-393 (adopting the findings of fact and modifying legal conclusions of the Initial Order). Where an administrative

decision is based on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard. *Verizon Nw*, 164 Wn.2d 909 at 916; *Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.*, 189 Wn. App. 127, 135–36, 356 P.3d 753, 756 (2015). A motion for summary judgment is a question of law reviewed de novo. *Osborn v. Mason Cnty*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law. *Id.*

Where the underlying facts of a case are undisputed by the parties, such as those determined through cross motions for summary judgment, only purely legal questions are left to be resolved. *Seattle 420, LLC v. State Liquor & Cannabis Bd*., 18 Wn. App. 2d 1020, *rev. denied*, 198 Wn.2d 1027, 498 P.3d 956 (2021). Though questions of law are reviewed de novo, appellate courts give substantial weight to an agency's interpretation of the statutes it administers. *Lee's Drywall Co. v.*

State, Dep't of Lab. & Indus., 141 Wn. App. 859, 864, 173 P.3d 934, 936 (2007).

Here, the question of law presented for the Court of Appeals' consideration was, given the Board's broad statutory authority to regulate the cannabis industry, whether the Board had a legitimate basis to cancel VRG's pending application following the repeal of the Priority System. Opinion at 13. The Court reviewed the relevant facts and, applying de novo review, affirmed the Final Order. Ultimately, the Court concluded that the Board's action was proper based on three separate legal grounds. *Id.* at 13-21.

First, the Court applied the plain language of RCW 69.50.331(1)[10] to the facts of the case de novo, and concluded that the Board satisfied the requirements of the statute when it conducted a "comprehensive, fair, and impartial

[10] RCW 69.50.331(1) states, "[f]or the purpose of considering any application for a license to . . .sell cannabis, . . . the board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received."

evaluation" of VRG's application by sorting it into Priority 1. To have interpreted it to mean that the Board was required to formally process 2,340 applications for 222 available licenses––as argued by VRG—would have led to "absurd" results. Opinion at 17.

Second, the Court interpreted the plain language of WAC 314-55-050[11] and RCW 69.50.354[12] and applied these laws to the uncontested facts of the case de novo, including that: (1) the Board withdrew *all* pending Priority System applications after the legislature repealed that System; (2) the application period had closed; (3) the Board issued all licenses it intended to issue; and (4) the Board ceased accepting any additional license applications pending the implementation of

---

[11] WAC 314-55-050 "includes a list of non-exhaustive reasons why the [Board] may cancel an application, but the reasons for cancelling an application may not fall into any of the supplied reasons, as is the case here." Opinion at 18, fn. 13.

[12] RCW 69.50.354 states, in relevant part, "There may be licensed, *in no greater number in each of the counties of the state than as the board shall deem advisable*, retail outlets established for the purpose of making cannabis . . . available for sale []." (emphasis added).

the Social Equity Program. Opinion at 18-19. "Under these facts, WSLCB correctly exercised its broad authority" in cancelling VRG's application. Opinion at 19-20.

Finally, the Court properly rejected VRG's argument that the Board's decision to cancel its application was arbitrary and capricious. Opinion at 20. Applying de novo review, the Court concluded that the Board "considered VRG's arguments, gave VRG an opportunity to be heard, and VRG presented no evidence that suggests that the WSLCB did not act with honesty and upon due discretion." *Id.*

Since the Final Order was based on undisputed facts arrived at via cross motions for summary judgment, the Court followed settled precedent when it applied de novo review and resolved the case on purely legal grounds.

3. Under settled precedent, the Court of Appeals was not required to apply substantial evidence review to the Board's Final Order and Statement of Intent

The Court of Appeals followed settled precedent when it applied de novo review to the undisputed facts, overlaying the

APA standard of review on the summary judgment standard. *See,* e.g. *Verizon Nw.*, 164 Wn.2d at 916, 194 P.3d 255; *Puget Soundkeeper*, 189 Wn. App. at 135–36. VRG cites no authority, and none exists, requiring the Court to apply substantial evidence review to an undisputed factual record.

a. No authority supports requiring reviewing courts to apply substantial evidence review to agency orders based on undisputed facts.

In support of its contention that the Court erred in declining to apply substantial evidence review, VRG relies on two cases: *Lemire v. State, Department of Ecology*, 178 Wn.2d 227, 309 P.3d 395 (2013), and *Southwick, Inc.*, 191 Wn.2d 689, 426 P.3d 693 (2018). Neither case requires a reviewing court to apply substantial evidence review to undisputed facts.

In *Lemire*, a landowner challenged a Department of Ecology Order requiring him to take remedial action to curb pollution on his property. *Lemire*, 178 Wn.2d 227, 231. Ecology moved for summary judgment, which the Pollution Control Hearings Board granted upon concluding there were no

genuine issues of material fact. *Id.* Unlike the present case, the parties did *not* file cross motions for summary judgment – rather, the respondent fiercely disputed many of Ecology's factual findings. *See Lemire v. Dep't of Ecology,* No. 09-159, 2010 WL 4390114, at *2 (Wash. Pollution Control Hr'gs Bd. Oct. 27, 2010). ("Mr. Lemire disputes many of Ecology's observations[]"). Because the facts were *contested,* this Court applied substantial evidence review to the administrative record and ultimately affirmed the agency's Order.

As part of its analysis in *Lemire*, this Court explicitly cited its prior decision in *Verizon Nw.* concerning the appropriate standard of review for an administrative order stemming from a summary judgment decision. *Lemire.*, 178 Wn. 2d 227, 232, (quoting *Verizon Nw.*, 164 Wn.2d 909, 916.) In this case, the Court of Appeals specifically relied upon *Verizon Nw.* when it declined to apply substantial evidence review. Opinion, p. 14, fn. 9. If this Court had intended to overrule *Verizon Nw.,* it would have done so in *Lemire*. Instead,

this Court's jurisprudence draws a distinction between the posture of a summary judgment order based on undisputed facts, such as *Verizon Nw.*, and one where a party continues to challenge the factual findings of an agency, such as in *Lemire*. Only the latter may necessitate a reviewing court to engage in substantial evidence review of a contested agency record. As in *Verizon Nw.*, this case presents no such necessity.

The second case cited by VRG, *Southwick*, is equally unpersuasive. Indeed, *Southwick* supports the Court of Appeals' decision in this case declining to apply substantial evidence review. The procedural posture in *Southwick* is similar to that presented here: both agency and respondent filed cross motions for summary judgment based on undisputed facts. *Southwick, Inc.*, 191 Wn.2d 689, 700. Since the case was based on undisputed facts, the Court of Appeals explicitly refused to apply substantial evidence review, declaring:

> Southwick also argues that the Board's order is not supported by substantial evidence. But a challenge based on substantial evidence is a challenge to the findings of

> fact. And Southwick has never challenged the underlying facts and did not assign error to the Board's findings of fact. ***Southwick is actually arguing that the uncontested facts do not satisfy the statutes in question. Accordingly, Southwick's challenge is actually a challenge to the Board's application of the law, not to the sufficiency of the evidence supporting the order, and will be addressed as such. Southwick's "substantial evidence" challenge will not be discussed further.***

Southwick, Inc., 200 Wn. App. 890, 892 (fn. 2) (emphasis added). In affirming the Court of Appeals in *Southwick,* this Court also declined to apply substantial evidence review, opting instead to review the issues of statutory interpretation and the agency's conclusions of law de novo. *Southwick, Inc.*, 191 Wn.2d 689, 695. Thus, this Court resolved the case on purely legal grounds. *Id.*

In sum, the Court of Appeals followed settled precedent when it applied de novo review to the uncontested facts of this case. VRG fails to identify any authority requiring a reviewing court to apply substantial evidence review in this context.

b. The Statement of Intent to Withdraw is not subject to any of the judicial review provisions of the APA, including substantial evidence review.

VRG wrongly insists that the Court of Appeals erred not only in declining to apply substantial evidence review to the Board's Order, but also in refusing to apply substantial evidence review to the Board's Statement of Intent. Petition at 16, AR 199-201. VRG misinterprets the judicial review provisions of the APA. As the Court properly found in its Opinion, RCW 34.05.570(3) only provides for judicial review of *agency orders*—not proposed statements of intended agency action. Opinion at 19.

Under RCW 34.05.570(3), only agency orders are subject to judicial review. Agency action prior to the issuance of an order is subject to review *within the agency*, not judicial review. RCW 34.05.461(1)(a). The Board's rules clarify that statements of intent may be appealed within the agency, and are thus not final orders as that term is defined by RCW 34.05.461(1)(a). *See, e.g.*, WAC 314-55-160(2)(b)(ii); WAC 314-55-165(2).

Since the Statement of Intent is not a final order, and thus not subject to judicial review under RCW 34.05.570(3), the Court of Appeals acted consistent with the APA when it declined to apply substantial evidence review to this preliminary decision. Opinion at 19. VRG's argument that the Court should have applied substantial evidence review to proposed agency action is without legal foundation and should be rejected.

4. The Board's Final Order is supported by undisputed substantial evidence

For all the reasons previously explained, substantial evidence review is not appropriate in this case. However, even if it were, this Court's review is particularly unwarranted because substantial evidence supports the Final Order cancelling VRG's application.

For challenges regarding substantial evidence under RCW 45.05.570(3)(e), the substantial evidence review standard applies. *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 565, 309 P.3d 673, 678

(2013). Under this standard, a court must determine whether there exists a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *City of Redmond v. Cent. Puget Sound Growth Mgmt Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The court must view the evidence "in the light most favorable to ... 'the party who prevailed in the highest forum that exercised fact-finding authority.' " *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Thus, the Board is the prevailing party for purposes of the substantial evidence standard.

This Court has held that it will not set aside a discretionary decision under the substantial evidence standard absent a clear showing of abuse by the agency. *ARCO Prod. Co. v. Utilities & Transp. Comm'n*, 125 Wn. 2d 805, 888 P.2d 728, 732 (1995). Further, the "substantial evidence" standard and the "arbitrary and capricious" standard are "articulations of what is essentially the same deferential standard of review. If there is not substantial evidence upon which to base a decision,

then it is arbitrary and capricious—and the agency has abused its discretion in exercising it in such a manner." *Id*. at fn. 1.

Notably, the Court of Appeals already determined that the Final Order in this case was *not* arbitrary and capricious. Opinion 20-21. The same conclusion is appropriate under substantial evidence review. Substantial evidence supports the Board's decision because it is undisputed that the Board distributed all 222 Priority System licenses to applicants who submitted their materials prior to VRG. AR 345-346, 390. *See also* Opinion at 19. The existence of currently unissued licenses, while undisputed, has no relevance to VRG's case because the Board is not required to issue all licenses at a given time, and VRG is not entitled to a license. This is especially true in light of the Legislature's implementation of the Social Equity Program, which specifically designates "licenses that were not previously issued by the Board but could have been issued without exceeding the limit on the statewide number of cannabis retailer licenses before January 1, 2020," as eligible

for issuance under the Program. RCW 69.50.335. The Legislature assumed that the Board had the discretion not to issue all licenses, because the *only way* the licenses described by the Legislature could be available to Social Equity applicants is if the Board had such discretion.

In sum, VRG fails to establish that the Court of Appeals' decision conflicts with existing precedent as required by RAP 13.4(b)(1) to warrant this Court's review.

B. The Court of Appeals' Opinion Presents No Questions of Substantial Public Interest

This case involves no far reaching implications that typically mark a matter of substantial public interest under RAP 13.4(b)(4). VRG claims that, by declining to apply substantial evidence review, the Court "all but invites agencies to render summary judgment in their favor, based on whatever 'undisputed' facts they choose, thereby insulating agency orders from meaningful judicial review and the important check on agencies it provides." Petition at 29. At the outset, the language focused on by VRG is dicta, unrelated to the Court's

resolution of the case on legal grounds. *See supra* § (IV)(A)(2). Further, the Court's opinion is itself unpublished and has no precedential value. *See* GR 14.1 (governing citations to unpublished opinions). The language VRG emphasizes could, at most, be cited as non-binding authority.

Regardless of the precedential nature of the opinion (or lack thereof), VRG's contention—that the opinion "insulates" agency orders from meaningful judicial review—is simply wrong. VRG's argument rests on the false premise that the Court ignored a disputed factual record. As discussed above, the Court followed settled precedent when it reviewed the uncontested facts and relevant law, applied de novo review, and affirmed the Final Order. Since VRG's argument is based on a false premise, it has no real-world implications and thus cannot possibly yield the type of legal crisis imagined by VRG.

This case also does not present an issue of substantial public importance because VRG was the only Priority System applicant which appealed the Board's cancellation of its

application. This case is therefore narrowly tailored to VRG. Since the Priority System is long since repealed, and the pending Priority System applications long since cancelled, no applicant under that System will ever be eligible to challenge the Board's past decisions cancelling their applications.

Since the Court of Appeals' opinion affects only VRG individually, this case does not warrant this Court's review under RAP 13.4(b)(4).

V. CONCLUSION

VRG's Petition for Review fails to satisfy any of the criteria for accepting review in RAP 13.4(b). The Court of Appeals, consistent with precedent, applied de novo review to the Board's Final Order based on an undisputed factual record.

/ / /

/ / /

/ / /

The opinion is narrowly tailored to VRG and grounded in sound legal principles and settled case law. The Board respectfully requests that this Court deny VRG's Petition for Review.

This document contains 4,749 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of October, 2022.

ROBERT W. FERGUSON
Attorney General

SUSIE GILES-KLEIN
Assistant Attorney General
WSBA# 46608
Assistant Attorney General
Attorneys for Washington State
Liquor and Cannabis Board
1125 Washington Street SE
Olympia, WA 98504-0100
(360) 586-6055 -0100

DECLARATION OF SERVICE

I certify that I filed and served the foregoing Response to Petition for Discretionary Review with the Clerk of the Court using its electronic filing system and had it served on the following counsel of record, in the manner indicated herein:

JOHN GOLDMARK REBECCA SHELTON DAVIS WRIGHT TREMAINE LLP 920 FIFTH AVENUE, SUITE 3300 SEATTLE, WA 98104-1610	☐ U.S. Mail via state Consolidated Mail Service (with proper postage affixed) ☒ Via electronic mail per Supreme Court e-filing system: johngoldmark@dwt.com; rebeccashelton@dwt.com
RYAN AGNEW ATTORNEY AT LAW PO BOX 601 MILTON, WA 98354-0601	☐ U.S. Mail via state Consolidated Mail Service (with proper postage affixed) ☒ Via electronic mail per Supreme Court e-filing system: agnew.rr@gmail.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of October, 2022, at Olympia, Washington.

_____

MARLENA MULKINS
Legal Assistant

AGO/GCE

October 28, 2022 - 4:05 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,215-2
Appellate Court Case Title:	Vision Research Group, LLC. v. WA State Liquor and Cannabis Board
Superior Court Case Number:	20-2-01338-0

The following documents have been uploaded:

- 1012152_Answer_Reply_20221028160216SC591486_5651.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer20221028ToPetition.pdf

A copy of the uploaded files will be sent to:

- agnew.rr@gmail.com
- danielanajera@dwt.com
- gretanelson@dwt.com
- johngoldmark@dwt.com
- rebeccashelton@dwt.com

Comments:

Sender Name: Marlena Mulkins - Email: marlena.mulkins@atg.wa.gov
Filing on Behalf of: Susan Fae Giles-Klein - Email: susie.gilesklein@atg.wa.gov (Alternate Email: marlena.mulkins@atg.wa.gov)

Address:
PO Box 40100
1125 Washington Street SE
Olympia, WA, 98504-0100
Phone: (360) 664-9006

Note: The Filing Id is 20221028160216SC591486