IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court Case No. 101215-2

(Court of Appeals, Division II, Case No. 55576-0-II)

WASHINGTON STATE LIQUOR
AND CANNABIS BOARD,

Respondent,

v.

VISION RESEARCH GROUP, LLC,
a Washington limited liability company,

Petitioner.

VISION RESEARCH GROUP, LLC'S PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND IDENTITY OF PETITIONERS

Petitioner Vision Research Group, LLC ("VRG") seeks review of the Court of Appeals' Decision designated in Part II of this Petition.

This Petition seeks review of a dangerous and erroneous loophole created by the Court of Appeals' Decision. The Decision allows agencies to evade judicial review under the substantial evidence standard mandated by the Washington Administrative Procedure Act ("APA"), RCW Chapter 34.05, by rendering "summary judgment" based on erroneous factual findings. If an agency's findings on which it bases summary judgment cannot be reviewed under the substantial evidence standard, then an agency can "find" whatever facts it chooses—unsupported by substantial evidence, or any evidence—without subjecting those findings to meaningful judicial review required by the APA. This is precisely what happened here.

Both the Administrative Law Judge ("ALJ") and the Superior Court invalidated the agency decision issued by the Washington State Liquor and Cannabis Board ("WSLCB").

The Court of Appeals, however, sua sponte decided the WSLCB's order and supporting factual findings against VRG could not be reviewed for substantial evidence, holding that "the substantial evidence standard is not appropriate when evaluating motions for summary judgment." Appendix ("App.") A at 19. As a result, the Court of Appeals upheld the WSLCB's order. The Court of Appeals' holding conflicts with decisions where this Court reviewed an agency's summary judgment order to determine whether the material facts underlying that order were supported by substantial evidence. *See, e.g., Southwick, Inc. v. State, Dep't of Licensing Bus. & Pros. Div.*, 191 Wn.2d 689, 700 426 P.3d 693 (2018); *Lemire v. State, Dep't of Ecology*, 178 Wn.2d 227, 238, 309 P.3d 395 (2013). Its holding also conflicts with the plain language of the APA, which requires the court to reverse an agency order that "is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court."
RCW 34.05.570(3)(e).

The Court of Appeals sidestepped that critical inquiry, refusing to review the WSLCB's order or the facts on which it relied under the substantial evidence standard. Failing to correct this erroneous Decision telegraphs to agencies that they may avoid meaningful judicial review by rendering "summary judgment" in their favor, based on finding disputed facts in their favor. In other words, an agency can base summary judgment on purported "undisputed" material facts—even if unsupported by the record—and exempt its order from meaningful review on appeal. This erroneous application of the APA conflicts with the statute and this Court's decisions under the APA, and would undermine (if not eradicate) the critical check and balance of meaningful judicial review of agency orders.

For these reasons, this Court should grant review under RAP 13.4(b)(1) and (4).

II. COURT OF APPEALS DECISION

VRG seeks review of the Decision filed by Division Two on June 22, 2022 ("Decision"), holding it could not review the

WSLCB's Amended Final Order and accompanying factual record under substantial evidence review set forth in the APA, RCW 34.05.570(3)(e). As a result, the WSLCB's Amended Final Order, along with its false and disputed findings of fact, was affirmed. A copy of the Decision (*Vision Rsch. Grp., LLC v. Washington State Liquor & Cannabis Bd.*, No. 55576-0-II, 2022 WL 2236170, at *1 (Wash. Ct. App. June 22, 2022) (unpublished)) is included in the Appendix, *see* App. A.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by holding the substantial evidence standard does not apply in reviewing an agency's summary judgment order and supporting factual findings when challenged on appeal under RCW 34.05.570?

2. Did the Court of Appeals err by refusing to review the agency record and findings of fact in the Board's Amended Final Order to determine whether they were supported by substantial evidence?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. VRG submits a timely application.

On March 29, 2016, VRG timely submitted an application for a retail cannabis store, after the WSLCB announced it would increase the number of stores from 334 to 556. *See* AR 185, 192. VRG invested substantial time, effort, and resources in completing and timely submitting its application. Several weeks after submittal, WSLCB informed VRG that it was one of 290 applicants who qualified for Priority 1 status under RCW 69.50.331(a)(1). AR 190. VRG was then left to wait for the WSLCB to evaluate its application under the licensure criteria (WAC 314-55-020).

In 2017, once the application deadline passed and all applicants had been assigned a priority, the legislature repealed the priority system. App. B at 9, 36–37 (Ex. A). No action was taken with regard to VRG's application; VRG continued to wait for the WSLCB to evaluate its application.

2. Three years after applying, the WSLCB withdraws VRG's application, claiming no more licenses are available.

On May 7, 2019, the WSLCB unilaterally withdrew VRG's application. AR 197. The notice of withdrawal identified the reasons for withdrawal as "Other: Administrative Withdrawal." *Id.* The WSLCB followed this Notice with a Statement of Intent to Withdraw ("Withdrawal Order") on May 23, 2019, which justified its decision by stating "***the additional allotments had been filled*** and the remaining applications would be withdrawn." AR 199 (emphasis added). The Withdrawal Order was the final action of the WSLCB ordering the withdrawal of VRG's application. AR 200. The Withdrawal Order considered all notification information sent by the WSLCB and the papers submitted by VRG to appeal the decision. AR 200. The Withdrawal Order cited two statutes and one regulation as authority for its actions. AR 199 (citing RCW 69.50.331(1); RCW 69.50.345(1); WAC 314-55-050(17)). The WSLCB never explained how these sources of authority supported its decision to withdraw VRG's application.

3. VRG appeals the withdrawal and uncovers that the WSLCB's stated factual basis for withdrawal was false.

VRG appealed the Withdrawal Order to the Office of Administrative Hearings. During discovery, VRG learned the purported facts in the Withdrawal Order were false. In responses to discovery requests submitted under penalty of perjury in September 2019, the WSLCB admitted that there remained 75 licenses still available. AR 148. Indeed, this was just five months after the agency's order withdrawing VRG's application, contradicting the stated basis for the withdrawal (i.e., that there were no more licenses to allocate). A year and half after the Withdrawal Order in September 2020, 21 available licenses still remained. CP 78.

4. The ALJ grants VRG's Motion for Summary Judgment and denies the WSLCB's Cross Motion.

The parties filed cross motions for summary judgment before the Administrative Law Judge ("ALJ"). AR 114, 131. The WSLCB supported its decision by maintaining "there are

no more marijuana retail licenses for Licensing to issue, so there is no current licensing process." AR 116 (emphasis added). The ALJ rejected the WSLCB's argument, however, and granted summary judgment in VRG's favor. AR 343.

The ALJ issued an "Initial Order on Cross-Motions for Summary Judgment" and included a section articulating the undisputed facts for purposes of summary judgment. AR 343–47. The ALJ determined "[t]he number of active marijuana retail licenses is in flux…." based on the WSLCB's discovery responses. AR 346. Under the Conclusions of Law, the ALJ stated, "both parties filed motions for summary judgment based upon the same set of facts and no genuine issue of material fact exists. . . . Summary Judgment is proper." AR 348.

The ALJ also concluded "[the WSLCB] has previously allocated 556 marijuana retail licenses statewide. However, it has now apparently determined, ***without explanation***, that this number of allotments is too high." AR 350 (emphasis added). The ALJ added that "[the WSLCB's] broad discretion does not grant authority to withdraw/cancel pending applications simply for its administrative convenience." AR 350–51. The ALJ

determined that the WSLCB did not provide any explanation for why VRG should not receive an available license, assuming its application met the criteria for licensure. Finally, the ALJ reversed the WSLCB's withdrawal of VRG's license application. AR 351.

5. The WSLCB reverses the ALJ's Initial Order and adopts contrary "Findings of Fact, Conclusions of Law, and Final Order of the Board."

The WSLCB appealed the ALJ's Initial Order to the WSLCB. On February 18, 2020, the WSLCB issued a "Final Order" affirming the ALJ in all aspects. AR 380. But two days later, the WSLCB issued an "Amended Final Order," reversing its initial order and the ALJ's Initial Order. AR 387.

In this Amended Final Order, the WSLCB made disputed findings of fact, mislabeling them as "conclusions of law." *See Morgan v. Dep't of Soc. & Health Servs.*, 99 Wn. App. 148, 152, 992 P.2d 1023 (2000) ("Findings of fact labeled as conclusions of law will be treated as findings of fact when challenged on appeal." (citation omitted)). The WSLCB struck

the ALJ's Conclusion of Law 5.14, adding the following ***factual*** finding:

> There were only 222 retail marijuana licenses to award to Priority 1 applicants, and there were a total of 290 Priority 1 applicants. There were at least 222 other applicants who completed their application requirements prior to VRG. **The Board issued all of the available licenses to applicants prior to VRG; thus, there were no more licenses available to be issued to VRG.**

CP 68 (emphasis added). No evidence supports this key finding, and the WSLCB cited nothing to support it.

The WSLCB's factual findings that it had "issued all of the available licenses" and "no more licenses [were] available" were not included in the ALJ's undisputed "Facts for Purpose of Summary Judgment." To the contrary, the ALJ's Initial Order acknowledged the undisputed evidence that licenses remained available in September 2019. AR 346. The WSLCB's Amended Final Order ignored this and issued a contradictory finding that lacked any supporting evidence. *See* AR 142 ("The LCB ***admits that the agency has not filled all license allotments***." (emphasis added)); CP 15 ¶ 4.17 (as of September 10, 2019, there were only 481 active licenses, not the total 556).

The WSLCB made two additional disputed findings of fact in the Amended Final Order of the Board. It added Conclusion of Law 5.13, concluding that it had conducted an impartial evaluation of VRG's application. AR 390. This contradicted the WSLCB's response to discovery requests, which acknowledged that the WSLCB had never assessed VRG's qualifications for the application. AR 151. The WSLCB also added Conclusion of Law 5.15, which stated "[b]ecause the legislature repealed the priority system, no Priority 1 applicant will ever be issued a license under that system." AR 390. This, too, was contradicted by the record. There were 75 licenses available in September 2019, and 40 fewer licenses available in September 2020. AR 148; CP 75–78. During that one-year span, the WSLCB continued to issue licenses ***after*** the WSLCB withdrew VRG's application, and despite the repeal of the priority system. Thus, the record evidence shows licenses remained available and were being issued, contrary to the WSLCB's statements supporting its decision to withdraw VRG's application.

B. Procedural History

VRG appealed the WSLCB's Amended Final Order to Thurston County Superior Court. The Superior Court reversed the WSLCB's Amended Final Order on March 5, 2021. CP 187. The court found the WSLCB's Order was ***unsupported by substantial evidence***, arbitrary and capricious, an erroneous interpretation and application of the law, and in excess of statutory authority. CP 188. Critically, after examining the agency record, the court specifically found that the WSLCB "has ***not*** issued all statutorily authorized licenses," and VRG "still qualifies for a license on equal footing as any other qualified applicant." CP 188–89 (emphasis added).

The WSLCB appealed the Superior Court's decision, arguing that VRG's case was moot, and regardless, the decision to withdraw VRG's application did not violate the APA in any way. The Court of Appeals heard oral argument.

The Court of Appeals determined VRG's case was not moot because the WSLCB could grant meaningful relief to VRG. Specifically, the WSLCB could reinstate VRG's

application so that it could be evaluated and receive an available license. App. A at 10–11.

However, the Court of Appeals reversed the Superior Court's decision, thereby affirming the WSLCB's Amended Final Order. It found that the WSLCB complied with its obligation to evaluate VRG's application by conducting the Priority Assessment and the WSLCB has broad discretion to decide what to do with license applications. It rejected VRG's contention it was arbitrary and capricious for the WSLCB to cite statutes and regulations that did not provide an actual basis for withdrawal. App. A at 19–20. The WSLCB never explained how these authorities justified withdrawing VRG's application.

But the Court of Appeals' Decision rested on a new rationale, through which it avoided determining whether the agency's order was supported by substantial evidence. It refused to review the WSLCB's Amended Final Order or any of the underlying agency record to determine whether the order or factual findings were supported by substantial evidence, or any evidence. App. A at 19. It held "because we review summary judgments de novo, the substantial evidence standard

is not appropriate when evaluating motions for summary judgment. Therefore, we do not address this issue." *Id.* (internal citation omitted).

This rationale was raised by the Court sua sponte; the WSLCB never raised this issue, and the parties did not address it in their briefing nor at oral argument. VRG timely moved for reconsideration of this issue, as well as the Court's holding that the WSLCB's decision was not arbitrary and capricious. VRG argued the Court of Appeals' Decision clearly contradicted this Court and Court of Appeals' precedent. App. C. Division Two denied the Motion for Reconsideration on July 29, 2022.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals erred in refusing to review the disputed factual findings in the WSLCB's Amended Final Order and the agency record under the substantial evidence standard in RCW 34.05.570(3)(e). The APA requires reviewing courts to award relief where an agency's "order is ***not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the***

agency record for judicial review, supplemented by any additional evidence received by the court under this chapter." (RCW 34.05.570(3)(e) (emphasis added).) An agency's order is supported by substantial evidence where ***the evidence*** is sufficient "to persuade a fair-minded person of the truth or correctness of the order." *Wash. State Dairy Fed'n v. State*, 18 Wn. App. 2d 259, 274, 490 P.3d 290 (2021) (citations and quotations omitted) (finding an administrative decision could not be supported by substantial evidence if the only "evidence" supporting the decision was a false statement of fact).

Despite the clear mandate in RCW 34.05.570(3)(e), the Court of Appeals asserted that substantial evidence review does not apply when reviewing summary judgment decisions—even if those findings rest on unsupported factual determinations. Not only is this contrary to the plain language of the statute, this holding conflicts with this Court's recent decisions. *See Lemire v. State, Dep't of Ecology*, 178 Wn.2d 227, 309 P.3d 395 (2013); *Southwick, Inc. v. State, Dept. of Licensing Business and Professions Division,* 191 Wn.2d 689, 426 P.3d 693 (2018).

A. The Court of Appeals erred by concluding the Withdrawal Order could not be reviewed under the substantial evidence standard.

The Court of Appeals claimed it could not review the WSLCB's Withdrawal Order, which they referred to as the Statement of Intent to Withdraw, for substantial evidence review. App. A at 19. This is error for two reasons.

First, the Withdrawal Order is part of the underlying agency record. The Court of Appeals effectively deleted the statutory directive to review the agency's order "***in light of the whole record before the court, which includes the agency record for judicial review***." RCW 34.05.570(3)(e) (emphasis added). The Amended Final Order incorporates the language of the Withdrawal Order. It contains the reasons why the WSLCB withdrew VRG's application. It is a critical part of the agency record, yet the Court of Appeals refused to review it.

Second, the Court of Appeals incorrectly assumed, without any analysis, that the WSLCB's Withdrawal Order is not an "order" under the APA. This, too, was error. Under the APA definitions in RCW 34.05.010(11)(a) and (1), the

Withdrawal Order (Statement of Intent to Withdraw) is an order in an adjudicative proceeding subject to substantial evidence review. *See* RCW 34.05.570(3) ("Review of agency orders in adjudicative proceedings"); 34.05.010(11)(a) ("'Order,' without further qualification, means a written statement of particular applicability that ***finally*** determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons") (emphasis added); 34.05.010(1) ("'Adjudicative proceeding,' means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings ***also include all cases of licensing*** and rate making ***in which an application for a license*** or rate change ***is denied*** . . . .") (emphasis added).

The Withdrawal Order is the final action of the WSLCB withdrawing, and effectively denying, VRG's application for a license. The Statement of Intent to Withdraw considered the Notice, Withdrawal Notification, and Appeal Request, which

argued VRG's case for keeping its application active. AR 72–73.

Both the WSLCB's Amended Final Order and the Withdrawal Order are subject to substantial evidence review. The Court of Appeals erred in refusing to apply that standard.

B. The Court of Appeals' holding that the substantial evidence standard of review cannot be used to evaluate Motions for Summary Judgment contradicts this Court's decisions applying substantial evidence review to Summary Judgment decisions.

The Court of Appeals' Decision conflicts with *Lemire v. State, Department of Ecology*, 178 Wn.2d 227, 309 P.3d 395 (2013) and *Southwick, Inc. v. State, Department of Licensing Business and Professions Division*, 191 Wn.2d 689, 426 P.3d 693 (2018).

In *Lemire*, the plaintiff challenged an administrative order directing him to curb pollution on his property. 178 Wn.2d at 230. The order was upheld on summary judgment by the Pollution Control Hearings Board ("PCHB"). *Id.* at 231. At summary judgment, the PCHB determined there were no

genuine issues of material fact in dispute. *Id.* Lemire appealed the decision to Columbia County Superior Court, which reviewed the administrative record, reversed the summary judgment determination, and invalidated the agency order, holding there was no direct evidence of pollution by Lemire in the record. *Id.* Ecology appealed and Division Three certified the case directly to this Court. *Id.*

This Court noted at the outset of its opinion that "[a]n agency's final decision may be invalidated by a superior court if the order is not supported by substantial evidence when the record is viewed as a whole." *Id.* at 233. This Court then examined the record to determine whether the order was supported by substantial evidence. *Id.* at 234 ("Hence, substantial evidence will support Ecology's order if the evidence shows that conditions on Lemire's ranch have substantial potential to violate prohibitions against discharging into state waters organic material that pollutes or tends to cause pollution."). This Court examined "[t]he evidence Ecology presented at the administrative hearing before the Board" and supporting declarations. *Id.* at 234. It determined that the trial

court erred when it found the order was not supported by substantial evidence. *Id.* at 236–38. This Court then looked at the operative and material facts for summary judgment and found "Lemire did not dispute those facts that were operative to Ecology's order" and, thus, summary judgment in favor of Ecology was proper. *Id.* at 236, 238.

Like in *Lemire*, the Court of Appeals should have reviewed the facts in the record to determine whether the underlying agency order (Withdrawal Order) finally cancelling VRG's application was supported by substantial evidence. As discussed *infra,* Section V.D, the Court could not have concluded the Withdrawal Order was supported by substantial evidence. The Court of Appeals, consistent with this Court's *Lemire* decision, should have then proceeded to assess whether the material facts relied on in the Amended Final Order were supported by substantial evidence and not in dispute. It erred in failing to do so.

This Court evaluated a summary judgment decision under substantial evidence review in an even more recent case. In *Southwick, Inc.*, 191 Wn.2d at 693, the Department of

Licensing issued a statement of charges against Southwick, Inc., alleging Southwick moved human remains within a cemetery without notifying any family members, violating the relevant statutes. Both parties moved for summary judgment, and the agency found in favor of the Department of Licensing. *Id.* Southwick appealed until the case reached this Court.

Like in *Lemire*, this Court stated at the beginning of its analysis, "[a]s relevant to this case, we may reverse the Board's order if it is based on an error of law or if it is unsupported by substantial evidence." *Southwick*, 191 at 695. The Court looked to the material facts supporting the Board's order on summary judgment and determined whether those facts were supported by substantial evidence. The Court then examined the facts supported by substantial evidence underlying summary judgment and found they were undisputed. *Id.* at 698.

The Court of Appeals' Decision here also conflicts with *Southwick, Inc.*, 191 Wn.2d 689 (2018). When VRG appealed the WSLCB's order withdrawing its application, both parties moved for summary judgment. The ALJ made a record of undisputed facts for purposes of summary judgment and

applied the law to those facts, finding that the WSLCB acted outside of its authority and provided no reason why VRG should not receive an available license. AR 351.

The WSLCB then reviewed the ALJ's Initial Order when the WSLCB appealed. And here is where VRG's case diverges from both *Southwick* and *Lemire* and underscores the critical role of substantial evidence review. The WSLCB did not merely reverse or adopt[1] the ALJ's Initial Order on Summary Judgment. It instead substituted the agency's own disputed findings of fact for the ALJ's conclusions of law. The WSLCB's findings were not proper on summary judgment. And those findings were not only unsupported by the record but also contradicted by it.

The Court of Appeals erred when it refused to review the WSLCB's disputed findings of fact for substantial evidence and protected those disputed findings and their supporting order from any meaningful judicial review. Its holding conflicts with

[1] The WSLCB did actually adopt the ALJ's Initial Order on February 18, 2020, but insists this was error and the Amended Final Order of February 20, 2020, which includes the disputed findings of fact, is the intended order.

this Court's decisions in *Southwick* and *Lemire*, where this Court reviewed the material facts and underlying record in summary judgment proceedings to determine whether those material facts were supported by substantial evidence.

To insulate an agency's findings of purported undisputed facts from substantial evidence review, as the Court of Appeals did in its Decision, eviscerates RCW 34.05.570(3)(e). Summary judgment proceedings are a useful, efficient tool commonly used during administrative proceedings but nevertheless not contemplated by the APA. *See Verizon Nw., Inc. v. Wash. Emp. Sec. Dep't*, 164 Wn.2d 909, 915–16, 194 P.3d 255 (2008). Meaningful APA review must include an opportunity for parties to challenge, and courts to review, an agency's findings supporting its summary judgment disposition. The Court of Appeals fundamentally erred in failing to do so.

C. The Court of Appeals' rationale misinterprets earlier Supreme Court precedent.

The Court of Appeals relied on two decisions to support its holding that substantial evidence review does not apply here. But a meaningful review of these cases shows that neither can

be used to insulate the WSLCB's Withdrawal Order or Amended Final Order from substantial evidence review.

The Court of Appeals cited *Verizon Northwest, Inc. v. Washington Employment Security Department,* 164 Wn.2d 909, 915–16, 194 P.3d 255 (2008) and relied primarily on a Court of Appeals' case, *City of Union Gap v. Washington State Department of Ecology,* 148 Wn. App. 519, 525–26, 196 P.3d 580 (2008).

In *Verizon*, the company appealed the agency's decision that its employees were eligible for unemployment benefits. 164 Wn.2d at 911–12. The ALJ granted summary judgment in favor of the Employment Security Department ("ESD") and the ESD affirmed the ALJ's ruling.

The sole issue on appeal before this Court was whether "employees who participated in Verizon's MVSP qualify for the . . . 'employer-initiated layoff' exception to . . . RCW 50.20.050(1)"—a purely legal issue. The issue of whether substantial evidence review applied was not on appeal, and this Court only addressed it in passing dicta. *See id.* at 916 n.4. Even in dicta though, the *Verizon* Court did ***not*** say that the

factual administrative record was immune from review, as the Court of Appeals held. The *Verizon* Court actually advised a less deferential standard would apply, noting "[w]e evaluate the facts in the administrative record de novo." *Id.* at 916. However, the *Verizon* Court never had occasion to evaluate the facts in the administrative record because the only issue on appeal was purely legal. *Verizon* does not hold that "substantial evidence" review does not apply nor can it support an interpretation that the factual record is immune from review, especially when the "findings of fact" are disputed. The Court of Appeals' erroneous enlargement of *Verizon* cannot stand.

The only other case the Court of Appeals cited, *Union Gap*, 148 Wn. App. at 525–26 does not rely on any precedent from this Court. The Court of Appeals in *Union Gap* looked at the agency's summary judgment order on review and found that it "did not include findings." *Id.* at 526. There was nothing factual for the Court of Appeals to review. Moreover, this opinion acknowledges that ***if an agency made factual findings***, as occurred here, substantial evidence review would apply. *Id.*

A proper interpretation and application of these cases confirms substantial evidence review applies here. The WSLCB made findings of facts in its Withdrawal Order and Amended Final Order. Both should be subject to review under the substantial evidence standard of the APA in RCW 34.05.570(3)(e).

At a minimum, the factual findings in the Withdrawal Order and the Amended Final Order should have been examined under substantial evidence review by the Court of Appeals, just as the Thurston County Superior Court did. But even under the Court of Appeals' misinterpretation of *Verizon*, the factual administrative record should have been subject to de novo review. The Court of Appeals did neither, dodging its duty to meaningfully review the agency's order. Its refusal to analyze the underlying factual record contradicts this Court's precedent and the cases it cited in support of its own holding.

D. Substantial evidence review requires reversing the WSLCB's Orders.

The WSLCB premised its Withdrawal Order on a false statement of fact. Its Amended Final Order ignored undisputed

evidence of these false statements, doubling down on the unsupported allegations. The factual record cannot "persuade a fair-minded person of the truth or correctness of [either] order." *Washington State Dairy Fed'n v. State*, 18 Wn. App. 2d 259, 274, 490 P.3d 290 (2021) (citations and quotations omitted).

In the "Summary of Relevant Facts" of the Withdrawal Order, the WSLCB claimed "the additional allotments had been filled." AR 72. But this was not true.

The WSLCB admitted during discovery that as of September 10, 2019, there were only 481 retailers licensed in Washington, meaning **75 licenses remained available *five months after* the WSLCB withdrew VRG's application**. AR 148. Many of these licenses were not "returned" or revoked but instead remained "unfilled." CP 77–78. In September 2020, a year and a half after VRG's application was withdrawn, "unfilled" licenses still remained. CP 78. Importantly, there were less than 75 licenses available in September 2020 than in September 2019, showing the WSLCB continued issuing licenses after it withdrew VRG's application—contrary to its repeated statement that no more licenses would be granted.

All this evidence was presented to the ALJ and subsequently to the WSLCB when reviewing the ALJ's Initial Order on Summary Judgment. The WSLCB ignored this evidence, instead repeating its untrue claims that "the additional allotments had been filled," the WSLCB "issued all of the available licenses," and "there were no more licenses available." AR 387, 390. The WSLCB did not explain the contradictory evidence, and, still, two years and almost three reviewing courts later, the WSLCB refuses to acknowledge these false statements—which critically, it used to support its decision to reverse the ALJ and render summary judgement in its own favor.

The WSLCB's orders hinged on the claim that no licenses were available. But this statement was false in May 2019, false in September 2019, and remained false in September 2020. The WSLCB stated no licenses would be issued to anyone who applied under the Priority system. AR 390. This is contradicted by the evidence—as the number of available licenses decreased between 2019 to 2020.

The WSLCB, for unexplained reasons, chose to withdraw VRG's application even though, as the record shows, other applicants were subsequently granted licenses. The WSLCB continued to award licenses to other applicants, just not VRG. The WSLCB has never explained this false premise it relied upon in withdrawing VRG's application, eviscerating VRG's rights and hard work.

This is the only conclusion the Court of Appeals could have reached under substantial evidence review, just as the Superior Court concluded in invalidating the WSLCB's decision as unsupported by substantial evidence. The Court of Appeals erred; it side-stepped the burden of holding the WSLCB accountable and created a dangerous conflict with this Court's precedent. It 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. This cannot be the standard under the APA; it would allow agencies to make findings without judicial review or oversight.

VI. CONCLUSION

For the above reasons, VRG respectfully asks this Court to grant review of the Court of Appeals' Decision.

RESPECTFULLY SUBMITTED this 29th day of August, 2022.

This document contains 5,000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I caused the foregoing document to be served on the following attorneys of record via email per the electronic service agreement, and/or via the Court's electronic court filing system and service:

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August 29, 2022 - 1:40 PM

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Note: The Filing Id is 20220829132615SC017043

APPENDIX A

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 22, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VISION RESEARCH GROUP, LLC, a Washington limited liability company, Respondent, v. WASHINGTON STATE LIQUOR and CANNABIS BOARD, an agency of the State of Washington, Appellant.	No. 55576-0-II UNPUBLISHED OPINION

WORSWICK, J. — The Washington State Liquor and Cannabis Board (WSLCB)[1] appeals the trial court's findings of fact, conclusions of law and order reversing the Board's amended final order (Amended Final Order) that had cancelled Vision Research Group's (VRG) Priority 1 application for a marijuana retail license. The WSLCB had withdrawn VRG's Priority 1 application after the legislature repealed the priority system, a method for processing license applications.[2] VRG appealed, and ultimately the WSLCB issued an Amended Final Order affirming the withdrawal of VRG's application. VRG sought judicial review, and the superior court reversed the Board's Amended Final Order.

[1] We refer to the appellate body of the Washington State Liquor and Cannabis Board as the "Board," and otherwise refer to the Washington State Liquor and Cannabis Board as "WSLCB."

[2] The WSLCB asserts that this administrative withdrawal was the functional equivalent of the agency cancelling those applications under WAC 314-55-050.

The WSLCB appeals the superior court's order. The WSLCB argues that VRG's case is moot. VRG argues that the WSLCB exceeded its statutory authority by refusing to evaluate VRG's license application, and that the WSLCB had no basis to withdraw VRG's application.[3] We hold that the case is not moot. We further hold that the WSLCB did not exceed its statutory authority when it withdrew VRG's application.

FACTS

I. THE PRIORITY SYSTEM AND VRG'S APPLICATION

After Washington voters approved Initiative 502 legalizing recreational marijuana in the state in 2012, the WSLCB began issuing marijuana retail licenses to vendors using a lottery system. Former WAC 314-55-081 (2013). In 2015, the legislature implemented former RCW 69.50.331(1)(a) (2015), which required the WSLCB to implement a priority system and assign Priority 1, 2, or 3 status to applications for the new licenses. The WSLCB created rules implementing the priority system to specify the criteria for applicants, and then sorted the applications into one of the priority levels. Former WAC 314-55-020 (2015).

The WSLCB processed applications for licensure in order of priority and by date of application submission. Former WAC 314-55-020(3). Thus, Priority 1 applications were more likely to result in a license because the agency processed them first. *See Top Cat Enters., LLC v. City of Arlington*, 11 Wn. App. 2d 754, 756, 455 P.3d 225 (2020). Receiving Priority 1 status did not guarantee licensure; it merely determined the priority for processing. Former RCW 69.50.331. In 2015, the WSLCB also increased the number of available licenses by 222, changing the maximum number of retail licenses from 334 to 556.

[3] Although the WSLCB is the appellant, VRG bears the burden of proving the invalidity of the Board's decision. RCW 34.05.570(1)(a).

Following implementation of the priority system, the WSLCB opened a window period from October 12, 2015 to March 31, 2016 for applicants to submit license applications for the 222 available licenses. VRG submitted its application on March 29, two days before the deadline. The WSLCB received 2,340 applications for 222 available licenses. Of those applications, 290 qualified as Priority 1, including VRG's application. The WSLCB processed the applications according to their priority and the order they were received and all 222 available licenses were issued without the WSLCB reaching VRG's application. The remaining Priority 1 applications, including VRG's application, were put on hold.

In 2017, the legislature repealed the priority system under which VRG had submitted its application. LAWS OF 2017, ch. 317, § 2, at 1316-17. Although the legislature amended RCW 50.69.331 to repeal the priority system, it left intact subsection (1) which states "the [WSLCB] must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." RCW 69.50.331(1). In fact, the repeal of the priority system left RCW 69.50.331 with language identical to what it contained when the statute was first enacted with the exception of adding subsections (1) and (8). *Compare* RCW 69.50.331 *with* former RCW 69.50.331 (2012).

In 2019 and in response to the legislature's repeal of the priority system, the WSLCB withdrew all pending Priority 1 applications submitted during the 2015-16 application window, including VRG's. The WSLCB issued a "Statement of Intent to Withdraw Priority 1 Marijuana Retailer Application," asserting that all remaining Priority 1 applications would be withdrawn because all "additional allotments have been filled." Administrative Record (AR) at 183. The WSLCB relied on the following authority to support its decision to withdraw applications:

- RCW 69.50.331(1), which stated that the "[WSLCB] must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." Clerk's Papers (CP) at 98.

- RCW 69.50.345(1), which provided that the WSLCB "must adopt rules that establish the procedures and criteria necessary . . . [for] [L]icensing." CP at 98.

- WAC 314-55-050(17), which provided that the WSLCB may "deny, suspend, or cancel a marijuana license application or license" if it "determines the issuance of the license will not be in the best interest of the welfare, health, or safety of the people." CP at 98.

Sometime after the close of the 2015-16 application window, a number of marijuana licensees relinquished their licenses to the WSLCB by going out of business or having their licenses revoked for various reasons. Thus, the number of licensed marijuana retailers fell below the cap of 556 and continues to be below that number as of the time of this appeal. Since the close of the 2015-16 window, the WSLCB has not issued additional licenses because it determined that doing so would not be "in the best interest of the welfare, health, or safety of the people in the state." CP at 98.

VRG appealed the "Statement of Intent to Withdraw Priority 1 Marijuana Retailer License," and the matter was heard by an administrative law judge (ALJ) at the Office of Administrative Hearings. AR at 387. The parties filed cross-motions for summary judgment, and the ALJ granted VRG's summary judgment motion, reversed the WSLCB's "Statement of Intent to Withdraw Priority 1 Marijuana Retailer License," and ordered the WSLCB to maintain VRG's application as pending.

The WSLCB filed a petition for review with the Board. The Board issued a final order affirming the ALJ's initial order. However, two days later, the Board amended its Final Order and reversed the ALJ's order, granting the Board's motion for summary judgment, and concluding that "the [WSLCB] conducted a comprehensive, fair, and impartial evaluation of

VRG's license application, which is apparent because VRG's application was awarded Priority 1."[4] AR at 390. The Board also found that the WSLCB "issued all of the available licenses to applicants prior to VRG; thus, there were no more licenses available to be issued to VRG." AR at 390. Thus, the Board affirmed the Statement of Intent to Withdraw Priority 1 Marijuana Retailer License.

II. THE SOCIAL EQUITY PROGRAM

In 2020 and while VRG's judicial review was pending in superior court, the legislature enacted the Marijuana Social Equity Program, a program intended to

> promote business ownership among individuals who have been disproportionately impacted by the war on drugs, in order to remedy the harms resulting from the enforcement of cannabis-related laws. [And] to center the voices of Black, Indigenous, and People of Color communities that have been most impacted by enforcement of cannabis-related laws.[5]

See LAWS OF 2020, ch. 236, § 1.

The statute provides that beginning December 1, 2020, the WSLCB "may" issue social equity applicants those retail licenses "that have been subject to forfeiture, revocation, or cancellation," or that "were not previously issued by the [WSLCB] but could have been issued without exceeding the limit." RCW 69.50.335(1). The WSLCB may deny an application by an applicant if "[t]he application does not meet Social Equity goals or does not meet Social Equity plan requirements." RCW 69.50.335(3)(b)(i). The legislature did not establish criteria under which social equity applicants would be evaluated, but it created a task force to make

[4] It is unclear from the record why the Board amended its final order, but the Board's briefing below claims it was "Board Staff Error." CP at 133.

[5] Governor's Interagency Council on Health Disparities, *The Council's Work*, https://healthequity.wa.gov/councils-work/social-equity-cannabis-task-force.

recommendations to the WSLCB by December 2022 regarding factors the WSLCB should consider in distributing licenses under this program. RCW 69.50.336(9).

The WSLCB is not currently accepting marijuana retail license applications because it is waiting for the task force to issue its recommendations. Once the task force provides the WSLCB with its recommendations, the WSLCB will create an application process and develop rules regarding how the program will be implemented.[6]

VRG appealed to Thurston County Superior Court, and the trial court reversed the Board's Amended Final Order. The WSLCB appeals.

ANALYSIS

I. Mootness

The WSLCB argues that we should dismiss this case as moot for two reasons. First, the legislature repealed the priority system under which VRG applied for a license, making VRG's requested relief meaningless. Second, the legislature's adoption of E2SHB 2870, permitting the issuance of marijuana retail licenses under the Social Equity Program, supersedes the abolished priority system. In other words, the WSLCB argues that regardless of its decision to withdraw applications submitted under the priority system, it is no longer able to process VRG's application, thus VRG's case is moot. VRG is seeking relief through an order that maintains its application as pending to be evaluated under the criteria applied at the time the WSLCB withdrew its application. We hold that VRG's appeal is not moot.

"'A case is technically moot if the court cannot provide the basic relief originally sought'" or "'can no longer provide effective relief.'" *Dioxin/Organochlorine Ctr. v. Pollution*

[6] *See Wash. Liquor & Cannabis Bd., Cannabis Licensing*, https://lcb.wa.gov/mjlicense/ cannabis-licensing (last visited on 02/11/2022).

Control Hr'gs Bd., 131 Wn.2d 345, 350, 932 P.2d 158 (1997) (quoting *Snohomish County v. State*, 69 Wn. App. 655, 660, 850 P.2d 546 (1993)). If the relief available would be meaningless, the case is moot. *See SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 603, 229 P.3d 774 (2010).[7] "'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) (quoting 13A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984)).

A. *Relevant Statutes*

Under the priority system, former RCW 69.50.331(1) stated that "for the purpose of considering any application for a license . . . the state liquor and cannabis board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." Subsection (a) described that the WSLCB "must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry." Former RCW 69.50.331(1)(a). It also stated that the WSLCB must give preference between competing applications in the licensing process to applicants based on their experience—for example, Priority 1 was awarded to applicants that demonstrated extensive experience, and Priorities 2 and 3 were awarded to applicants with little to no experience. Former RCW 69.50.331(1)(a).

If an application was granted Priority 1, it was more likely to receive a license because it guarantees earlier processing, but it does not guarantee licensure. *See, e.g.*, *Top Cat Enters.*,

[7] Neither party argues this case presents a continuing and substantial issue of public interest. *State v. Hunley*, 175 Wn.2d 901, 906, 287 P.3d 584 (2012).

11 Wn. App. 2d at 756 (Priority 1 applicant denied licensure because he failed to meet additional regulatory requirement that there be a 1,000 feet separation between property lines of licensees' businesses or buildings and restricted entities). After an applicant was assigned priority based on criteria set in former RCW 69.50.331(1)(a), the application must then meet a set of regulatory requirements before the applicant was granted licensure. RCW 69.50.331(8); WAC 314-55-020(4) ("All marijuana license applicants must meet the qualifications required by the WSLCB before they will be granted a license."). RCW 69.50.331(8) outlines requirements regarding where a marijuana retail may not be conduct its operations. For example, it states that the WSLCB "may not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older." RCW 69.50.331(8)(a). In addition, WAC 314-55-020 conditions licensure on various additional factors.

The priority system was repealed in 2017, with no additional amendments instructing the WSLCB on whether it should continue evaluating applications, and if so, under which criteria. LAWS OF 2017, ch. 317 § 2, at 1317. Despite the repeal of the priority system, the legislature left intact the requirement that the WSLCB "must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." *See* LAWS OF 2017, ch. 317 § 2, at 1317; RCW 69.50.331(1). It also maintained licensure criteria under RCW 69.50.331(8). And, WAC 314-55-020 has not been repealed or amended by the WSLCB.

In 2020, the legislature enacted the Social Equity Program. The legislature described the program as "allowing *additional* marijuana retail licenses for social equity purposes." LAWS OF

2020, ch. 236, at 1 (emphasis added).[8] The legislature stated that the purpose of the program was to "remedy[] harms resulting from the enforcement of cannabis-related laws in disproportionately impacted areas" and that "creating a social equity program will further an equitable cannabis industry by promoting business ownership among individuals who have resided in areas of high poverty and high enforcement of cannabis-related laws." LAWS OF 2020, ch. 236 § 1, at 2. In addition, the legislature stated the following: "It is the intent of the legislature that implementation of the social equity program authorized by this act not result in an increase in the number of marijuana retailer licenses above the limit on the number of marijuana retailer licenses in the state established by the [WSLCB] before January 1, 2020." LAWS OF 2020, ch. 236 § 1, at 3.

RCW 69.50.335 provides rules for social equity applicants, and it states

> (1) Beginning December 1, 2020, and until July 1, 2029, cannabis retailer licenses that have been subject to forfeiture, revocation, or cancellation by the [WSLCB], or cannabis retailer licenses that were not previously issued by the [WSLCB] but could have been issued without exceeding the limit on the statewide number of cannabis retailer licenses established before January 1, 2020, by the [WSLCB], may be issued or reissued to an applicant who meets the cannabis retailer license requirements of this chapter.
>
> (2)(a) In order to be considered for a retail license under subsection (1) of this section, an applicant must be a social equity applicant and submit a social equity plan along with other cannabis retailer license application requirements to the [WSLCB]. . . .
>
> . . . .
>
> (3)(a) In determining the issuance of a license among applicants, the [WSLCB] may prioritize applicants based on the extent to which the application addresses the components of the social equity plan.

[8] The WSLCB acknowledged that the Social Equity Program creates a "new cannabis license type." *See e.g., Wash. Liquor & Cannabis Bd., Cannabis Licensing*¸ https://lcb.wa.gov/se/social-equity-task-force (last visited on 02/12/2022).

> (b) The [WSLCB] may deny any application submitted under this subsection if the [WSLCB] determines that:
>
> (i) The application does not meet social equity goals or does not meet social equity plan requirements; or
>
> (ii) The application does not otherwise meet the licensing requirements of this chapter.

A "social equity applicant" means

> (i) An applicant who has at least fifty-one percent ownership and control by one or more individuals who have resided in a disproportionately impacted area for a period of time defined in rule by the [WSLCB] after consultation with the commission on African American affairs and other commissions, agencies, and community members as determined by the [WSLCB];
>
> (ii) An applicant who has at least fifty-one percent ownership and control by at least one individual who has been convicted of a cannabis offense, a drug offense, or is a family member of such an individual; or
>
> (iii) An applicant who meets criteria defined in rule by the [WSLCB] after consultation with the commission on African American affairs and other commissions, agencies, and community members as determined by the [WSLCB].

RCW 69.50.335(6)(c). And, RCW 69.50.325(3)(d) provides that "The [WSLCB] *may* issue marijuana retailer licenses pursuant to [Chapter 69.50] and RCW 69.50.335." (emphasis added).

B. *VRG's Requested Relief Is Not Meaningless*

The WSLCB argues that this appeal is moot because VRG's requested relief is meaningless. We disagree.

The WSLCB assigned VRG's application Priority 1 before the repeal of the priority system. LAWS OF 2017, ch. 317, § 2. The priority system simply gave VRG's application priority among a pool of applicants. Former RCW 69.50.331. VRG was in a queue to be evaluated under general licensure criteria still in effect as of the time of this appeal. *See e.g.,* RCW 50.69.331(8); WAC 314-55-020. When the legislature repealed the priority system, it was

silent on whether the WSLCB was authorized to withdraw or cancel all pending applications prior to processing, and it did not state that no application could be evaluated under the WAC 314-55-020 or RCW 69.50.331(8)'s criteria. LAWS OF 2017, ch. 317, § 2. The legislature simply repealed the *order* in which the WSLCB should review applications, not *how* or *whether* the applications should be reviewed. LAWS OF 2017, ch. 317, § 2. In addition, for the years following the repeal of the priority system but prior to the enactment of the Social Equity Program, the legislature maintained the requirement that the WSLCB must conduct a "comprehensive, fair, and impartial evaluation of the applications timely received." RCW 69.50.331(1).

Although the order of priority was repealed by the legislature, the criteria for evaluating and issuing licenses remains the same. Thus, maintaining VRG's application would allow it to be considered under criteria that was in place when the WSLCB withdrew VRG's application, though not necessarily in the same order of priority. *See, e.g.*, RCW 69.50.331(8); WAC 314-55-020. It may be that VRG's "placement" in the queue is affected by the repeal of the priority system. RCW 69.50.335(3)(a). However, we cannot determine that the new criteria would render VRG's pending application meaningless because the WSLCB has not yet adopted new criteria, and we have no information on the number of social equity applicants or the number of retail licenses WSLCB will issue. Therefore, based on the current criteria in RCW 69.50.331(8) and WAC 314-55-020, allowing VRG's application to remain pending would not be meaningless.

C. *The Social Equity Program Does Not Render This Appeal Moot*

The WSLCB next argues that this appeal is moot because legislation mandates that future retail marijuana licenses may be issued only under the Social Equity Program. The WSLCB

contends that the enactment of the Social Equity Program necessarily forecloses the possibility of issuing licensing under any other criteria. We disagree because the Social Equity Program is permissive, and the program does not restrict licensure to only social equity applicants—it creates a new, additional class of applicants.

The Social Equity Program allows for a new type of licensure, but it does not bar other types of applicants and licenses. The Social Equity Program permits, but does not mandate, the WSLCB to issue or prioritize licenses to social equity applicants. RCW 69.50.325(3)(d); RCW 69.50.335(3)(a). Specifically, RCW 69.50.335(1) states that the WSLCB "may" issue licenses under the Social Equity Program. Similarly, RCW 69.50.325(d) provides that "The [WSLCB] *may* issue marijuana retailer licenses pursuant to [Chapter 69.50] and RCW 69.50.335." (emphasis added). The legislature described the program as "allowing *additional* marijuana retail licenses for social equity purposes." LAWS OF 2020, ch. 236, at 1 (emphasis added). The WSLCB does not point to authority stating that the Social Equity Program *requires* the WSLCB to process only social equity applicants nor can we point to such authority.

The WSLCB also mischaracterizes VRG's argument by stating that "VRG seeks a ruling that would require the WSLCB to prioritize its defunct application over future applicants under the Social Equity Program." Br. of Appellant at 22. But that is not what VRG is seeking; instead, VRG is asking us to "evaluate [its application] for compliance with applicable criteria." Br. of Resp't at 26. As established, the criteria used to evaluate applications after they have been assigned priority is still in effect as of the time of this appeal, and no authority restricts the WSLCB from evaluating applications or issuing licenses in compliance with that criteria. *See, e.g.,* RCW 69.50.331(8); WAC 314-55-020.

Because VRG's requested relief is not meaningless, and because the Social Equity Program is not the sole method by which the WSLCB is authorized to issue licenses, we hold that this appeal is not moot.

II. VALIDITY OF THE WSLCB'S DECISION TO WITHDRAW VRG'S APPLICATION

A. *Standard of Review and Legal Principles*

The Administrative Procedure Act (APA) governs review of agency action. RCW 34.05.570. We sit in the same position as the superior court and review the Board's decision in light of the administrative record. *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959 (2015). We "review only the board's decision, not the ALJ's decision or the superior court's ruling." *Marcum v. Dep't of Soc. & Health Servs.*, 172 Wn. App. 546, 559, 290 P.3d 1045 (2012).

The party asserting the invalidity of the agency's action bears the burden of proof. RCW 34.05.570(1)(a). We grant relief if the agency's decision contains any of the following:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> . . . .
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> . . . .
>
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3)(b), (d)-(e), (i). We review an agency's conclusion challenged under RCW 34.05.570(3)(b)-(d) de novo. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d

144, 155, 256 P.3d 1193 (2011). And, challenges under RCW 34.05.570(3)(i) are reviewed to determine whether the decision constitutes "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).[9]

A motion for summary judgment is a question of law reviewed de novo. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Where the original administrative action was decided on summary judgment, the reviewing court "must overlay the APA standard of review with the summary judgment standard." *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008).

B. *The WSLCB's Statutory Authority*

VRG argues that the WSLCB acted beyond its statutory authority by refusing to evaluate its application it as required by RCW 69.50.331(1). We disagree.

1. *Comprehensive, Fair, and Impartial Evaluation*

As an initial matter, the parties disagree about the meaning of a "comprehensive, fair, and impartial evaluation," and whether this language requires the WSLCB to simply determine the level of an application's priority or if it requires the WSLCB to process the application and determine its eligibility based on the merits. RCW 69.50.331(1). In order to

[9] The parties also argue whether the Board's decision was supported by substantial evidence. RCW 34.05.570(3)(e). But the substantial evidence standard is not appropriate when evaluating motions for summary judgment, so we do not address these arguments. *Verizon*, 164 Wn.2d at 916 n.4; *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 525-26, 195 P.3d 580 (2008)

determine whether the WSLCB complied with their statutory authority to "conduct a comprehensive, fair, and impartial evaluation of the applications timely received," we first consider the WSLCB's obligation to evaluate an application under RCW 69.50.331(1).

To ascertain the meaning of a statute, we first examine the statute's language. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). When interpreting statutory language, our fundamental objective is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To determine a statute's plain meaning, we examine the language of the statute, as well as other provisions of the same act, taking into account "'the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute.'" *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 11-12 (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, at 809-10 (6th ed. 2000)).

When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, we give effect to the statute's plain meaning. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10. We also avoid a "'literal reading of a statute which would result in unlikely, absurd, or strained consequences.'" *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011) (quoting *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002)). This court may not insert or remove statutory language—it is a task that is decidedly the province of the legislature. *Five Corners Family Farmers*, 173 Wn.2d at 311.

RCW 69.50.331(1) states that

> For the purpose of considering any application for a license to produce, process, research, transport, or deliver marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products subject to the regulations established

> under RCW 69.50.385, or sell marijuana . . . the [WSLCB] must conduct a comprehensive, fair, and impartial evaluation of the applications timely received.

And, subsection (2)(a) provides that

> The [WSLCB] may, in its discretion, subject to RCW 43.05.160, 69.50.563, 69.50.562, 69.50.334, and 69.50.342(3) suspend or cancel any *license*; and all protections of the licensee from criminal or civil sanctions under state law for producing, processing, researching, or selling marijuana, marijuana concentrates, useable marijuana, or marijuana-infused products thereunder must be suspended or terminated, as the case may be.

(emphasis added).[10]

We hold that RCW 69.50.331(1) is unambiguous. Subsection (1) requires a "comprehensive, fair, and impartial evaluation" of applications timely received. Subsequent to being assigned an application a priority tier, formal processing of the application requires an applicant to submit a security deposit as well as extensive documentation of various requirements, such as proof of a lease and proof of compliance with the State's traceability requirements, among other things.[11] The plain language of the statute does not require any investigation beyond the initial evaluation of all timely applications—under the Priority System, a timely evaluation included only an evaluation sufficient to assign a priority tier to each application.

[10] The statutes name various circumstances when a Board may cancel a license. RCW 43.05.160 permits the Board to issue a notice of correction when the licensee is not in compliance with the license conditions. Similarly, RCW 69.50.593 permits the Board to issue a civil penalty without notice in certain circumstances; RCW 69.50.562 and RCW 69.50.342(3) outline various guidelines the Board must follow when structuring a licensee compliance program; and, RCW 69.50.334 requires the Board to conduct a hearing before revoking or denying the reissuance of a license.

[11] Wash. Court of Appeals oral argument, *Vision Research Group, LLC. v. Wash. State Liquor Cannabis Board*, No. 555760 (Mar. 8, 2022), at 10 min., 20 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org.

VRG interprets RCW 69.50.331(1) to require investigation sufficient to determine whether VRG should be awarded an application. However, the legislature could not have intended to require the WSLCB to collect such extensive data from all 2,340 timely applicants to determine their eligibility despite there being only 222 available licenses because formal processing of the application requires an applicant to submit a security deposit, proof of a lease and proof of compliance with the State's traceability requirements, and other requirements.

We cannot interpret RCW 69.50.331(1) as requiring the WSLCB to conduct formal processing of over 2,000 applications. Doing so would place a heavy burden on both the WSLCB and all applicants. It is absurd to conclude that each applicant needs a compliant lease, a security deposit, and other requirements when only a few applicants have a chance of being granted an application. RCW 69.50.331(1) requires the WSLCB to evaluate only each application fairly and impartially, and it did so in compliance with RCW 69.50.331(1). (The WSLCB evaluated VRG's application in so far as to determine the tier of priority). As mentioned in oral argument, the next step after assigning priority was submission of extensive documentation such as proof of a lease.[12]

Because RCW 69.50.331(1) requires the WSLCB only to evaluate an application comprehensive, fairly, and impartially without additional investigation, the WSLCB acted in compliance with subsection (1) when it evaluated VRG's application to determine its priority. Therefore, the WSLCB acted within its statutory authority under RCW 69.50.331(1).

[12] Wash. Court of Appeals oral argument, *Vision Research Group, LLC. v. Wash. State Liquor Cannabis Board*, No. 555760 (Mar. 8, 2022), at 10 min., 20 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org.

2. *The WSLCB's Basis for Withdrawing VRG's Application*

VRG also argues that the WSLCB's reason for withdrawing VRG's application was unfounded. We disagree.[13]

The WSLCB enacted WAC 314-55-050, which states that "the WSLCB has broad discretionary authority to approve or deny a marijuana license application for reasons including, *but not limited to,* the following: . . . [if] [t]he WSLCB determines the issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state." WAC 314-55-050 (17).

The plain language of WAC 314-55-050 states that the WSLCB has "broad authority" to withdraw a license for a list of reasons, including any reason affecting "the welfare, health, or safety of the people of the state." WAC 314-55-050 (17). *See Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10 (when the plain language is unambiguous, courts give effect to the statute's plain meaning). Also, the WSLCB has authority to determine the number of licenses it may issue. RCW 69.50.354.

Here, the WSLCB's "Statement of Intent to Withdraw Priority 1 Marijuana Retailer Application" cited WAC 314-55-050(17) as a source of authority upon which it relied for cancelling VRG's application. CP at 97-98. Moreover, the WSLCB explained that it had

[13] VRG does not argue that WAC 314-55-050 does not grant the WSLCB broad authority to cancel a license application for any reason it deems appropriate. Instead, it argues that the reasons supplied by the WSLCB in the "Statement of Intent to Withdraw Priority 1 Marijuana Retailer Application" do not fall under subsection (17). However, the WSLCB is not confined to the reasons listed in WAC 314-55-050. WAC 314-55-050 includes a list of non-exhaustive reasons why the WSLCB 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.

determined that the issuance of the license would not be in the best interest of the welfare, health, or safety of the people of the state.

By the time the WSLCB withdrew VRG's application the legislature had repealed the priority system under which VRG submitted its application. The application period had closed, and WSLCB had issued all the retail licenses it intended to issue. In addition, the WSLCB ceased accepting any additional licenses pending for the task force's recommendations about upcoming licensure criteria and application process.[14] The WSLCB cancelled *all* pending applications, apparently without consideration or discrimination. Under these facts, WSLCB correctly exercised its broad authority to withdraw VRG's application.

VRG also argues that the WSLCB "Statement of Intent to Withdraw Priority 1 Marijuana Retailer Application" was based on a false statement that all additional allotments have been filled. It argues that we should review the letter under the substantial evidence standard pursuant to RCW 34.05.570(3)(e), which states that "[t]he *order* is not supported by evidence that is substantial." (emphasis added). RCW 34.05.570 applies to review of an agency's *order* not an agency's *action*. Therefore, we do not review the WSLCB's "Statement of Intent to Withdraw Priority 1 Marijuana Retailer Application" for substantial evidence, we review the Board's Amended Final Order instead. And, because we review summary judgments de novo, the substantial evidence standard is not appropriate when evaluating motions for summary judgment. *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 525-26, 195 P.3d 580 (2008). Therefore, we do not address this issue.

[14] *See Wash. Liquor & Cannabis Bd., Cannabis Licensing*, https://lcb.wa.gov/mjlicense/cannabis-licensing.

We hold the WSLCB acted within its authority when it withdrew VRG's application after conducting a review per RCW 69.50.331(1).

C. *The WSLCB's Decision to Withdraw VRG's Application Was Not Arbitrary and Capricious*

VRG argues that the WSLCB's decision to withdraw VRG's application was arbitrary and capricious. We disagree.

We review whether an agency decision was arbitrary and capricious de novo. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). Our Supreme Court has defined arbitrary or capricious agency action as action that "'is willful and unreasoning and taken without regard to the attending facts or circumstances.'" *Port of Seattle*, 151 Wn.2d at 589 (quoting *Wash. Indep. Tel. Ass'n,* 149 Wn.2d at 26). Agency action "taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious." *Yow v. Dep't of Health Unlicensed Practice Program*, 147 Wn. App. 807, 830, 199 P.3d 417 (2008).

VRG alleges that the WSLCB's action was arbitrary and capricious because it relied on RCW 69.50.331, RCW 69.50.345, and WAC 314-55-050 as authority to withdraw applications with no explanation for how the statutes empower WSLCB to withdraw VRG's application. However, such allegations are not enough to rise to the level of arbitrary and capricious agency action. The WSLCB 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.

Therefore, VRG failed to meet its burden of proving arbitrary and capricious action by the WSLCB.

CONCLUSION

VRG's case is not moot because we may grant it effective relief by ordering the WSLCB to maintain VRG's application as pending. The WSLCB acted within its authority when it withdrew VRG's application. Additionally, the WSLCB's decision to withdraw the application was not arbitrary and capricious. Accordingly, we reverse the superior court order and affirm the Board's Amended Final Order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Maxa, J.

Veljacic, J.

APPENDIX B

APPENDIX B

NO. 55576-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON STATE LIQUOR
AND CANNABIS BOARD,

Appellant,

v.

VISION RESEARCH GROUP, LLC,
a Washington limited liability company,

Respondent.

RESPONSE TO APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Liquor and Cannabis Board ("the Board") withdrew Vision Research Group LLC's ("VRG") retail marijuana license application on the basis that all "allotments had been filled." But that was not true. The Board never filled the allotments, and a number of licenses remain available. Even so, the Board claims that it had no choice but to withdraw the application because, when the legislature repealed the application priority ranking system, it negated VRG's application. That view dramatically overstates the effect of amendments to RCW 69.50.331 and ignores language the legislature left intact. In short, the law obligates the Board to fairly evaluate any timely license application—including VRG's. The Board never conducted that evaluation here. While the Board claims this dispute is "moot," the Court can—and should—order the Board to evaluate VRG's license for compliance with the applicable regulatory qualifications.

VRG does not seek "preferential treatment over Social Equity applicants," as the Board claims. App.'s Op. Br. at 2. VRG simply seeks a fair evaluation of its qualifications for a license—which VRG is entitled to by statute—under the criteria that were in effect when the Board wrongfully withdrew the application. The Court should affirm the Superior Court and reverse the Board's order.

II. STATEMENT OF THE CASE

A. Marijuana Retail Regulatory System

In 2012, Washington voters approved Initiative 502, which legalized and created a system for the distribution and sale of recreational marijuana. Laws of 2013, ch. 3, (codified as part of chapter 69.50 RCW); *see also Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 716, 406 P.3d 1199 (2017). At the legislature's direction, the Board oversees licensing of marijuana producers and retailers. *See* RCW 69.50.331.

WAC 314-55-020 lays out the qualifications for a license and the Board's application evaluation process. Among other requirements, applicants must have resided in the state for at least six months, must submit an operating plan, and must satisfy certain criminal history requirements. *See id.* Regulation provides that the Board "will conduct" an investigation of the applicants' criminal history, "will conduct" a financial investigation in order to verify the source of funds used, and may require a demonstration that the applicant is familiar with marijuana laws. *See id.* "Each marijuana license application is unique and investigated individually." *Id.*

The Board previously issued limited retail licenses to qualified applicants through a lottery system. *See Haines-Marchel*, 1 Wn. App. 2d at 717 (citing former WAC 314-55-081). In 2015, the Legislature enacted the Cannabis Patient Protection Act, which directed the Board to develop a new process that would prioritize applicants with experience in the medical marijuana industry that preexisted Initiative 502. Laws

of 2015, ch. 70, § 6, at 294-95. Former RCW 69.50.331 codified the Board's obligation to rank applications according to priority and fairly evaluate all timely applications:

> (1) For the purpose of considering any application for a license to . . . sell marijuana, . . . the board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received.
>
> (a) The state liquor and cannabis board must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry. The state liquor and cannabis board must give preference between competing applications in the licensing process to applicants that have the following experience and qualifications, in the following order of priority . . . .

Former RCW 69.50.331(1)(a). The statute laid out three tiers of priority, with first priority given to applicants who applied for a license prior to July 1, 2014 and had operated or worked for a medical marijuana collective garden prior to recreational legalization. Former RCW 69.50.331(1)(a)(i)[1].

[1] To obtain first or second priority status, applicants also had to establish that they had maintained a state business license and a municipal business license, and that they had a history of

Later in 2015, the Board announced that it would "increase the number of retail stores by 222 to ensure access by medical patients." AR 192. The Board changed the cap on retail licenses from 334 to 556. *See id.*; AR 350. Between October 12, 2015 and March 31, 2016, the Board accepted applications to fill these retail licenses. *See* AR 180.

B. VRG's Application

VRG timely submitted an application for a retail license on March 29, 2016. *See* AR 185. Several weeks later, the Board informed VRG that VRG's application qualified for Priority 1 status. AR 190. VRG's application was one of 290 applications that the Board assigned the highest priority. AR 180. In April 2017, the legislature eliminated subsection (a)(1) of former RCW 69.50.331 and thus repealed the requirement that the Board must divide applications into one of three priorities. Laws of 2017, Ch. 317, § 2, at 1316-17; *see* Exhibit

---

paying all applicable state taxes and fees. Former RCW 69.50.331(1)(a)

A (showing how the legislature altered RCW 69.50.331). But the legislature left intact the mandate of subsection (a) that the Board "must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." *See* RCW 69.50.331 (2020); Exhibit A.

On May 7, 2019—three years after VRG submitted its application and two years after the legislature eliminated the priority requirements of RCW 69.50.331—the Board withdrew VRG's application. CP 96 (AR 197). The Board sent VRG a notice identifying the "REASON FOR WITHDRAWAL" as: "Other: Administrative Withdrawal." *Id.*

The Board followed this notice with a May 23, 2019 "Statement of Intent to Withdraw," which included the following "Summary of Relevant Facts" (copied in its entirety):

> On December 16, 2015, in compliance with Substitute Senate Bill 5052, the Board published a press release notifying the public that the allotment of marijuana retailer's state-wide was increased to 556, opening 222 additional allotments available for application. The above named applicant applied for a Marijuana Retailer license during the

> open application window and was designated a priority 1 applicant on May 11, 2016. On May 1, 2019, Licensing emailed a notice to all remaining Priority 1 applicants notifying them that the additional allotments had been filled and the remaining applications would be withdrawn. On May 7, 2019 the application was withdrawn."

CP 97 (AR 199).

The Board's Statement of Intent then provided its "Relevant Authority and Conclusions," stating that "[t]he conduct outlined in paragraph 2.1 [the summary of relevant facts, above] constitutes grounds for the withdrawal of the marijuana license application" based on three sources of authority. First, the Board relied on RCW 69.50.331(1), which, as described above, states that the Board "must conduct a comprehensive, fair, and impartial evaluation of the applications timely received." CP 97-98. Second, the Board relied on RCW 69.50.345(1), which provides that the Board "must adopt rules that establish the procedures and criteria necessary" for licensing of "marijuana retailers, including prescribing forms and establishing application, reinstatement,

and renewal fees." CP 98. Third, the Board relied on WAC 314-55-050(17), which provides that the Board may "deny, suspend, or cancel a marijuana license application or license" if the Board "determines the issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state." *Id.* The Board recited these provisions but did not explain how they supported its decision to withdraw VRG's application. *See id.*

While the premise of the withdrawal was that "the additional allotments had been filled," the Board's records reflect that "**21 allotments were unfilled**" as of September 2020. CP 78. To be clear, these were not allotments that the Board filled but that became available again after the cancellation or revocation of a license; the Board's records separately account for 14 such "returned" licenses. *Id.* Thus, the Board's statement in May 2019 that the allotments had been filled was not true.

C. VRG's Appeal

VRG appealed the Board's withdrawal of its application to the Office of Administrative Hearings. In discovery, the Board acknowledged that, as of September 2019—just months after the Board withdrew VRG's application—it licensed 481 marijuana retailers, leaving 75 licenses available. AR 148. The Board also acknowledged that it made no determination as to whether VRG qualified for a marijuana retail license. VRG asked:

> Has the Agency determined that the Appellant/Applicant does not meet the qualifications under WAC 314-55-020 for the issuance of a marijuana retail license?

The Board answered:

> No. As to the Applicant's withdrawn application, the Agency has not processed it because it was withdrawn, and so is unable to determine the Applicant's qualifications for said application.

AR 151.

The parties filed cross motions for summary judgment before the administrative law judge ("ALJ"). AR 114, 131.

The Board asserted that withdrawal was proper because "there are no more marijuana retail licenses for Licensing to issue, so there is no current licensing process." AR 116. The ALJ rejected the Board's argument, however, and granted summary judgment in VRG's favor.

The ALJ found that the "repeal of the competitive, merit-based application process is prospective only and **does not, by implication, negate the validity of an application when it was received and evaluated**." AR 350 (emphasis added). The ALJ recognized that the Board "does not have the authority under RCW 69.50.331 to withdraw/cancel a marijuana retail license application where, as in this case, the application was initially approved by the Board under the criteria in place when it was received." *Id.* The ALJ noted that, despite allocation of 556 licenses, the Board "has now apparently determined, without explanation, that this number of allotments is too high," but the Board's "broad discretion does not grant authority to

withdraw/cancel pending applications simply for its administrative convenience." AR 350-51.

The Board's Licensing Division appealed the ALJ's ruling for review by the Board itself. On February 18, 2020, the Board issued a "Final Order" affirming the ALJ in all respects. AR 380. Two days later, the Board issued an "Amended Final Order," reversing its initial order and the ALJ. AR 387. The Board replaced the ALJ's conclusions of law with the Board's own view that it "conducted a comprehensive, fair, and impartial evaluation of VRG's license application, which is apparent because VRG's application was awarded Priority 1." CP 68. The Board's conclusions also asserted—falsely—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." *Id.*

VRG appealed to Thurston County Superior Court, which reversed the Board's Amended Final Order on March 5, 2021. CP 187. The Court found that the Board's order was

unsupported by substantial evidence, arbitrary and capricious, an erroneous interpretation and application of the law, and taken in excess of statutory authority. CP 188. The court concluded that the legislature's repeal of the priority system "did not disqualify nor mandate withdrawal of current applications in the database. It is prospective." *Id.* The court found that the Board "has not issued all statutorily authorized licenses," and VRG "still qualifies for a license on equal footing as any other qualified applicant." CP 189.

D. Social Equity Legislation

In 2020, while VRG's appeal was pending, the legislature adopted E2SHB 2870, which creates a "social equity program" for new marijuana retail licenses. *See* Laws of 2020, ch. 236, § 2; RCW 69.50.335. The law provides that, beginning December 1, 2020, the Board may issue to social equity applicants those retail licenses "that have been subject to forfeiture, revocation, or cancellation," or that "were not previously issued by the board but could have been issued

without exceeding the limit." RCW 69.50.335(1). Only social equity applicants may be "considered for a retail license" under the new system. RCW 69.50.335(2)(a). A "social equity applicant" is one from disproportionately impacted areas, who has been impacted by drug law enforcement, or who meets other criteria to be established. RCW 69.50.335(6)(c). The legislature created a "social equity task force" to form recommendations for the Board by December 9, 2022 as to factors the Board should consider in distributing licenses and whether "any additional cannabis . . . retailer licenses should be issued" beyond what the Board had issued as of June 11, 2020. RCW 69.50.336(9). The Board is waiting for the task force recommendations and not accepting new applications. *See* App.'s Op. Br. at 11.

III. ARGUMENT

"An administrative agency has only those powers either expressly granted or necessarily implied from statutory grants of authority." *Kauzlarich v. Washington State Dep't of Soc. &*

Health Servs., 132 Wn. App. 868, 874-75, 134 P.3d 1183 (2006). The Administrative Procedure Act governs review of agency action. *See* RCW 34.05.570. The agency action under review is the Board's Amended Final Order reversing the ALJ. The appellate court "stand[s] in the shoes of the superior court and appl[ies] the APA's standards governing judicial review directly to the agency record." *Musselman v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 841, 846, 134 P.3d 248 (2006).

The Court may grant relief from an agency order where:

- the order is "outside the statutory authority or jurisdiction of the agency";
- the agency "has engaged in unlawful procedure or decision-making process";
- the agency "erroneously interpreted or applied the law";
- the order is "not supported by evidence that is substantial when viewed in light of the whole record"; or
- the order is "arbitrary or capricious."

RCW 34.05.570(3).

An agency's order is supported by substantial evidence where the evidence is sufficient "to persuade a fair-minded

person of the truth or correctness of the order." *Washington State Dairy Fed'n v. State*, 490 P.3d 290, 300 (Wash. Ct. App. 2021) (citations and quotations omitted). An arbitrary or capricious action is one that is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Id.* (citations and quotations omitted).

In granting relief from an improper agency order, the Court may "set aside [the] agency action," order the agency to "take any action required by law," or "exercise discretion required by law." RCW 34.05.574(1).

A. The Board Acted Beyond its Statutory Authority by Refusing to Evaluate VRG's License Application.

The Board does not have discretion to refuse to evaluate a license application. "RCW 69.50.331(1) states the WSLCB **shall conduct** an evaluation of the application." *Haines-Marchel*, 1 Wn. App. 2d at 717 (emphasis added). The statutory text is clear: "For the purpose of considering any application for a license to . . . sell marijuana, the board **must**

conduct a comprehensive, fair, and impartial evaluation of the applications timely received." RCW 69.50.331(1) (emphasis added); *see also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) ("Courts should assume the Legislature means exactly what it says in a statute and apply it as written.") (quotations and citations omitted). The Board's own regulations appear to recognize the mandatory nature of its statutory responsibility by asserting the Board "**will conduct**" a number of inquiries and "[e]ach marijuana license application is unique and investigated individually." WAC 314-55-020.

The Board did not evaluate of VRG's application as required by statute. The Board admitted it never "determined that [VRG] does not meet the qualifications under WAC 314-55-020" because it "has not processed" VRG's application. AR 151; *see also* App.'s Op. Br. at 28-29 ("VRG's application was unprocessed by the Licensing Division . . . ."). VRG understands that it will be entitled to a license only if it satisfies all qualifications. But the law entitles VRG to a

comprehensive, fair, and impartial evaluation of whether it meets those qualifications. By refusing to conduct that evaluation, the Board acted outside its statutory authority. *See* RCW 34.05.574(3)(b).

The Board's conclusion to the contrary defies logic and the statutory scheme. In its Amended Final Order, the Board concluded that it was "apparent" the Board conducted the requisite comprehensive, fair, and impartial evaluation of VRG's application "because VRG's application was awarded Priority 1 (the highest priority)." AR 390. But the priority system simply determined—based on limited factors unrelated to the license qualifications—the order in which the Board would evaluate license applications; assigning priority was not, in itself, the evaluation mandated by RCW 69.50.331. Indeed, when repealing the priority system, the legislature simply struck the language describing application prioritization in former RCW 69.50.331(1)(a), but **left in place** subsection (1)—

mandating a full evaluation of "**any**" timely application. *See* Exhibit A (emphasis added).

The Board also misses the mark in claiming that VRG's application "will never be eligible for licensure because the Priority System under which they applied is no longer used to assess eligibility." App.'s Op. Br. at 27. For one, it is difficult to comprehend why the Board would wait for **two years** to withdraw VRG's application if it believed repeal of the priority language in 2017 meant the application would "never be eligible for licensure." But more importantly, the Board again mischaracterizes the role of the priority system and ignores the statutory language. Prioritization of license applications under former RCW 69.50.331(1)(a) had nothing to do with "assess[ing] eligibility" for a license, but simply determined which applications would be assessed for eligibility first. If the Board were correct that repeal of the priority language negated all applications that sought priority placement, then the legislature surely would not have left in place the mandate that

Board comprehensively evaluate all timely applications. If the legislature did not want the Board to consider the applications, it could have said so.

The Board's interpretation of the statue is not entitled to deference. *See* App.'s Op. Br. at 27. In APA review, "[w]here statutory construction is concerned, the error of law standard applies." *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. State, Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002) (citing RCW 34.05.570(3)(d)). "Under the 'error of law' standard, [the Court] may substitute [its] view of the law for the agency's." *Washington State Dairy Fed'n*, 490 P.3d at 300. "[T]he court determines the meaning and purpose of a statute de novo, although in the case of an ambiguous statute which falls within the agency's expertise, the agency's interpretation of the statute is accorded great weight, provided it does not conflict with the statute." *Pub. Util Dist. No. 1 of Pend Oreille Cty.*, 146 Wn2d at 790. As explained above, the statute is not

ambiguous, and the Board's interpretation conflicts the statute's mandatory language.

Moreover, the licensing statutes at issue do not implicate the Board's "expertise" in a way that would warrant deference. The Board relies on *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000) to support deference, but that case involved the Department of Ecology's interpretation of regulations implicating complex technical issues of hydraulic continuity between groundwater and surface water. *See id.* at 77. By contrast, the Supreme Court has held that deference is inappropriate where the agency's legal conclusions "concern statutory interpretation" and the factual conclusions are "neither technical nor complex." *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 420, 341 P.3d 953 (2015) (holding agency's determination of whether BIAW was a political committee was not entitled to deference). There is nothing technical or complex about the Board's withdrawal of

VRG's license; the Board simply acted on a faulty interpretation of an unambiguous statute.

B. The Board's Basis for Withdrawing VRG's Application is Non-Existent.

The premise of the Board's Statement of Intent to withdraw VRG's application was that "additional allotments had been filled." CP 97 (AR 199). That is not true. And it never has been. As the Superior Court recognized, the Board "has not issued all statutorily authorized licenses." CP 188. The legislature apparently recognized the same, in directing the Board to use forthcoming social equity criteria to issue "retailer licenses that **were not previously issued** by the board but could have been issued without exceeding the limit on the statewide number of marijuana retailer licenses" (in addition to revoked or returned licenses). RCW 69.50.335(1) (emphasis added); *see also* CP 159 (Superior Court relying on same legislative provision). In its Opening Brief, the Board backtracks and claims the maximum licenses "had been (**or would imminently**

be) issued." App.'s Op. Br. at 29-30 (emphasis added). But that is not true either; the Board never filled the allotments (*see* CP 78), and just five months after withdrawing VRG's application, there were **75 licenses available** (*see* AR 148).

Beyond the false assertion that license allotments were filled, the Board offered **no factual support** for its withdrawal and refusal to evaluate VRG's license. The Board did not find that VRG failed to meet any license qualifications and did not even consider VRG's qualifications. To be sure, when the only "evidence" supporting an administrative decision is a false statement of fact, the decision is not supported by "substantial evidence" under the APA. *See, e.g.*, *Washington State Dairy Federation v. State*, 490 P.3d 290, 302-303 (2021) (agency's decision not supported by substantial evidence where the agency omitted relevant information from its determination "without explanation"). "Such conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious." *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-

18, 934 P.2d 1179, *opinion corrected,* 943 P.2d 265 (1997) (city council's restriction on length of building in land use permit was arbitrary and capricious because it did not explain adverse impact of larger building or how smaller building would mitigate impacts).

The lack of support for the withdrawal is clear from the Board's strained reliance on irrelevant legal authority in the Statement of Intent. The Board recited RCW 69.50.331 (mandating the Board evaluate all timely applications) and RCW 69.50.345(1) (allowing the board to adopt rules such as fees for license applications), with no explanation for how either apply. Nothing in either statute suggests the Board may withdraw a license application without evaluation. *See Kauzlarich*, 132 Wn. App. at 875 ("An administrative agency has **only** those powers either **expressly granted or necessarily implied from statutory grants of authority**.") (emphasis added). To the extent the Board recited the statutes to suggest its general role in the licensing process necessarily implies the

right to withdraw applications when allotments have been filled, that is irrelevant; allotments remained, and licenses are still available.

The Statement of Intent's reliance on WAC 314-55-050(17)—which allows the Board to "deny, suspend, or cancel a marijuana license application or license" if the license "will not be in the best interest of the welfare, health, or safety of the people of the state"—fairs no better. The Board acknowledges that it "could not have reached this conclusion" with respect to VRG's application because the application was "unprocessed by the Licensing Division and therefore unassessed for potential threats to public health or welfare." App.'s Op. Br. at 28-29. Instead of articulating an individualized health and safety rationale (as its own regulations require), the Board supports its reliance on WAC 314-55-050(17) by simply repeating its two primary theories: (1) that repeal of the priority system rendered pending applications "defunct," and (2) that the "maximum number of licenses . . . had been (or would be

imminently be) issued." *Id.* at 29-30. Again, both these justifications are fatally flawed, and cloaking them as concerns over "welfare, health, or safety" adds no support to the Board's withdrawal of VRG's application.

C. This Dispute is Not Moot, and the Forthcoming Social Equity Program has No Impact on VRG's Application.

The Court can order effective relief to VRG, and as a result, the appeal is not moot. *See Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty*, 122 Wn.2d 619, 631, 860 P.2d 390 (1993), *amended by* 866 P.2d 1256 (1994) (appeal moot if "it presents purely academic issues and where it is not possible for the court to provide effective relief.").

The Board argues the appeal is moot for two reasons. First, the Board claims the repeal of the priority system from RCW 69.50.331 means "no Priority 1 applicant can be issued a license under the now-abolished system," and as result, it would be "futile" to reverse the Board's withdrawal of the application. *See* App.'s Opp. Br. at 20-21. But as explained, the Board

reads far too much into the legislature's repeal of the priority system. The legislature merely struck the language requiring the Board to evaluate applications in a certain order, while leaving untouched that the Board "must" comprehensively and fairly evaluate all timely applications. *See* Exhibit A. The Board withdrew VRG's application rather than evaluate it. The Court can order the Board to reinstate the application and evaluate it for compliance with applicable criteria. *See* RCW 34.05.574(1). That would be "effective relief."

Second, the Board argues that the legislature's creation of the social equity applicant system renders VRG's appeal moot because the Board will only grant licenses under that system in the future. *See* App.'s Op. Br. at 21-22. Relatedly, the Board argues that, if the Court grants relief, it should simply order that VRG's application remain pending for the Board to evaluate under still-unknown social equity criteria sometime in the future. *See id.* at 37-38. Thus, according to the Board, even though VRG applied for a license in 2016 and the Board

withdrew the application in 2019, VRG's application must meet the 2020 legislation's still-unknown social equity qualifications.

Nothing in the statute indicates that the social equity program applies retroactively to VRG's application as the Board claims. Washington courts apply a "strong presumption against retroactivity." *Houk v. Best Dev. & Const. Co.*, 179 Wn. App. 908, 913, 322 P.3d 29 (2014). The statute provides that the Board may issue retail licenses to social equity applicants "[b]eginning December 1, 2020." RCW 69.50.335(1). VRG submitted its application more than four years earlier, and the Board points to nothing that would justify such an extraordinary retroactive application of the law.

Retroactive application of the social equity program would be particularly unjust in this case. The Board lacked authority to withdraw VRG's application in 2019, and in doing so, the Board circumvented its obligation to fairly evaluate VRG's application and created a prolonged dispute. The Board now claims that VRG must meet a new set of criteria and

compete with a new set of applicants because—by virtue of the improper withdrawal—the Board had not evaluated VRG for a license as of December 1, 2020. The Court should order the Board to fairly and comprehensively evaluate VRG's application under the qualifications that existed when VRG applied and when the Board improperly withdrew VRG's application.[2] Application of the statute to deprive VRG of this evaluation would contravene constitutional due process protections. *See Willoughby v. Dep't of Lab. & Indus.*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) (applicant for benefits had "vested interest" protected by

[2] The Board argues that VRG initially only requested restoration of its "position as a retail license applicant," but "did not seek the right to have its application processed by the Board." App.'s Op. Br. at 15. But as explained above, the law explicitly requires the Board to process all timely applications. *See* RCW 69.50.331. Thus, the Board must process VRG's application fairly and comprehensively if the application is restored, and the Board's suggestion that VRG has taken inconsistent positions has no merit.

due process because Department of Labor & Industries had "a statutory duty to conduct an investigation pursuant to an injury claim" and failed to do so).

IV. CONCLUSION

For these reasons, the Court should set aside the Board's Final Amended Order and order the Board to reinstate VRG's application to allow for the fair, comprehensive, and impartial evaluation of the application required by statute.

This document contains 4,471 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of October, 2021.

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Susan Bright

EXHIBIT A

Sec. 2. RCW 69.50.331 and 2015 2nd sp.s. c 4 s 301 are each amended to read as follows:

<< WA ST 69.50.331 >>

(1) For the purpose of considering any application for a license to produce, process, research, transport, or deliver marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products subject to the regulations established under RCW 69.50.385, or sell marijuana, or for the renewal of a license to produce, process, research, transport, or deliver marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products subject to the regulations established under RCW 69.50.385, or sell marijuana, the state liquor and cannabis board must conduct a comprehensive, fair, and impartial evaluation of the applications timely received.

(a) ~~The state liquor and cannabis board must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry. The state liquor and cannabis board must give preference between competing applications in the licensing process to applicants that have the following experience and qualifications, in the following order of priority:~~

~~(i) First priority is given to applicants who:~~

~~(A) Applied to the state liquor and cannabis board for a marijuana retailer license prior to July 1, 2014;~~

~~(B) Operated or were employed by a collective garden before January 1, 2013;~~

~~(C) Have maintained a state business license and a municipal business license, as applicable in the relevant jurisdiction; and~~

~~(D) Have had a history of paying all applicable state taxes and fees;~~

~~(ii) Second priority must be given to applicants who:~~

~~(A) Operated or were employed by a collective garden before January 1, 2013;~~

~~(B) Have maintained a state business license and a municipal business license, as applicable in the relevant jurisdiction; and~~

~~(C) Have had a history of paying all applicable state taxes and fees; and~~

~~(iii) Third priority must be given to all other applicants who do not have the experience and qualifications identified in (a)(i) and (ii) of this subsection.~~

~~(b)~~ The state liquor and cannabis board may cause an inspection of the premises to be made, and may inquire into all matters in connection with the construction and operation of the

premises. For the purpose of reviewing any application for a license and for considering the denial, suspension, revocation, or renewal or denial thereof, of any license, the state liquor and cannabis board may consider any prior criminal conduct of the applicant including an administrative violation history record with the state liquor and cannabis board and a criminal history record information check. The state liquor and cannabis board may submit the criminal history record information check to the Washington state patrol and to the identification division of the federal bureau of investigation in order that these agencies may search their records for prior arrests and convictions of the individual or individuals who filled out the forms. The state liquor and cannabis board must require fingerprinting of any applicant whose criminal history record information check is submitted to the federal bureau of investigation. The provisions of RCW 9.95.240 and of chapter 9.96A RCW do not apply to these cases. Subject to the provisions of this section, the state liquor and cannabis board may, in its discretion, grant or deny the renewal or license applied for. Denial may be based on, without limitation, the existence of chronic illegal activity documented in objections submitted pursuant to subsections (7)(c) and (10) of this section. Authority to approve an uncontested or unopposed license may be granted by the state liquor and cannabis board to any staff member the board designates in writing. Conditions for granting this authority must be adopted by rule.

APPENDIX C

APPENDIX C

NO. 55576-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON STATE LIQUOR
AND CANNABIS BOARD,

Appellant,

v.

VISION RESEARCH GROUP, LLC,
a Washington limited liability company,

Respondent.

RESPONDENT VISION RESEARCH GROUP, LLC'S MOTION FOR RECONSIDERATION OF ORDER TERMINATING REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Pursuant to RAP 12.4, Respondent Vision Research Group, LLC ("VRG") respectfully requests that this Court reconsider its June 22, 2022 decision terminating review ("Opinion"). In deciding the Washington State Liquor and Cannabis Board ("WSLCB") did not violate the Washington Administrative Procedures Act, RCW 34.05.570, the Court erred by (1) refusing to apply the "substantial evidence" standard under RCW 34.05.570(3)(e) and (2) interpreting and applying the "arbitrary and capricious" standard contrary to Washington Supreme Court precedent and the record itself.

The Court determined that VRG's request for relief is not moot; the WSLCB could reinstate VRG's application.[1] Opinion ("Op.") 21. VRG asks this Court to correct the errors of law and fact in its Opinion and order the WSLCB to reinstate and proceed with evaluation of VRG's application.

[1] VRG recognizes that, following reinstatement, it would only receive a license if its application satisfied the requisite criteria under WAC 314-55-020.

II. ARGUMENT

VRG respectfully requests the Court reconsider two erroneous aspects of its Opinion as explained below.[2]

First, the Court erred in refusing to review factual findings in the WSLCB's Final Amended Order under the substantial evidence standard set forth in RCW 34.05.570(3)(e). The Court overlooked the statute's language requiring the Court to look beyond the Amended Final Order itself to the agency record for substantial evidence supporting its factual findings. *See* RCW 34.05.570(3)(e) (requiring relief where the agency's "order is not supported by evidence that is substantial ***when viewed in light of the whole record before the court, which includes the agency record for judicial review***, supplemented by any additional evidence received by the court under this chapter" (emphasis added)). The Court thus failed to apply the substantial evidence standard as required by the statute and Washington Supreme Court precedent. *See, e.g., City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*,

[2] While VRG seeks reconsideration for these two main reasons, VRG does not waive additional arguments as to why the Court erred in its decision.

136 Wn.2d 38, 46, 959 P.2d 1091 (1998) ("In reviewing agency findings under RCW 34.05.570(3)(e), substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" (citation omitted)); *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011) (same).

The Court's Opinion also raised a new argument, one which the WSLCB never raised in its briefing or argument, regarding the procedural posture of the WSLCB's decision after the ALJ's Initial Order on summary judgment. The Court asserted that, despite the clear language in RCW 34.05.570(3)(e), substantial evidence review does not apply when reviewing summary judgment decisions. Op. 19. But the WSLCB did not make a decision on summary judgment or restrict its order to questions of law. The WSLCB instead engaged in fact finding, subjecting its order to substantial evidence review. The WSLCB supplanted the ALJ's findings by recharacterizing the facts (in the agency's favor, which is also improper on summary judgment) and turning hotly disputed issues of fact into purported "conclusions of law." *See*

Scott's Excavating Vancouver, LLC v. Winlock Props., LLC, 176 Wn. App. 335, 342, 308 P.3d 791 (2013) ("[W]e review a finding of fact erroneously labeled as a conclusion of law as a finding of fact . . . ."); *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (examining the substance of the conclusion of law and determining that the conclusion was actually a finding of fact); Tegland, 2A Wash. Prac.: Rules Practice RAP 2.5 (6th ed.). The Court's stated reasoning, that substantial evidence review does not apply at summary judgment, does not insulate the WSLCB here because the agency made findings of fact to support the Amended Final Order that is the subject of this appeal. The Court's conclusion improperly precluded the entire avenue of relief under substantial evidence review for VRG. The Court's rationale, if uncorrected, would enable agencies to avoid meaningful review of their factual determinations by improperly making them on "summary judgment."

Second, the Court's conclusion that the WSLCB did not act arbitrarily and capriciously is contrary to law and unsupported by the record. The Court stated, without support,

that citing statutes without any explanation as to why they empower the WSLCB to withdraw VRG's application does not rise to the level of arbitrary and capricious. Op. 20. This contradicts Washington Supreme Court precedent, which recognizes that an agency acts arbitrarily and capriciously when it fails to explain the basis for its action—which is what happened here.

Further, the Court's Opinion contradicts the record. It states that "VRG presented no evidence that suggests that the WSLCB did not act with honesty and upon due discretion." *Id.* But this overlooks that VRG presented evidence that the WSLCB made a false statement, knew or should have known it was false, and continued to act as if the false statement were true, without acknowledging the contradictory evidence. The Court's Opinion glosses over the fact that VRG presented all this evidence to the WSLCB. It similarly overlooks that the WSLCB never responded to the evidence that additional licenses remained available, avoiding the issue through the red herring argument that the Priority 1 system was repealed. AR 363. If the Court had not overlooked VRG's evidence

(including WSLCB's own admission in sworn interrogatory answers), the Court could not avoid finding that the WSLCB's order was arbitrary and capricious. Finally, the Court also states that VRG was given an opportunity to be heard. But this, too, is inaccurate. The WSLCB issued its Final Order affirming and adopting the ALJ's Initial Order on February 18, 2020. CP 62. Two days later, without allowing VRG any opportunity to further be heard, the WSLCB did an abrupt reversal—it changed the ALJ's legal conclusions, contradicted the previously undisputed findings of fact, and made new factual findings. CP 70. The Court thus erred in concluding VRG had an opportunity to be heard before the WSLCB suddenly reversed its own "Final Order."

VRG respectfully requests the Court reconsider its Opinion for these and the following reasons. VRG asks this Court to award appropriate relief by ordering the WSLCB to reinstate and evaluate its application.

A. The Court failed to apply the substantial evidence standard required by statute.

The court must grant relief under RCW 34.05.570(3)(e), if an agency "order is not supported by evidence that is substantial ***when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter***." (emphasis added).

Yet, the Court refused to review the WSLCB's action or order under this substantial evidence standard. If the Court had done so, it could not have avoided the conclusion that the WSLCB's stated basis for its decision lacked any supporting evidence. There is no evidence that the WSLCB issued all 222 license allotments—at any point in time. *See, e.g.*, AR 142 (In WSLCB's Motion for Summary Judgment before the ALJ: "***The LCB admits that the agency has not filled all license allotments***." (emphasis added)). Instead, the evidence repeatedly highlights that the WSLCB's statement was false and its decision has ***no evidence*** to support it, let alone the requisite "substantial evidence." *See, e.g.*, AR 148 (As of

September 2019, there were 75 available licenses); CP 78 (As of September 2020, 21 allotments were unfilled).[3]

1. Because the WSLCB made factual findings, the substantial evidence standard applies.

The Court's Opinion side-stepped the substantial evidence standard by claiming that this statutory standard is not appropriate when evaluating motions for summary judgment. Op. 14 n.9; 19. But the Court mistook the subject of this appeal. The ALJ's decision on summary judgment is not on review here; the WSLCB's findings and decision after reviewing the ALJ's Initial Order is on appeal.

This rationale was raised by the Court *sua sponte* in its Opinion; the WSLCB never raised this issue, and the parties did not address it in their briefing or at oral argument. The Court relies on two cases to support its position that substantial evidence review is inapplicable here. But a meaningful review of these cases shows that neither insulates the WSLCB's

[3] The decrease in available licenses between September 2019 and September 2020 further demonstrates that the WSLCB *was continuing to grant* more licenses, contrary to the WSLCB's assertion that no additional licenses would be granted.

Amended Final Order from substantial evidence review.[4] In contrast to both *Verizon* and *City of Union Gap*, the WSLCB did not adopt the entire order of the ALJ at summary judgment or confine its Amended Final Order to questions of law.

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[4] *Verizon Nw., Inc. v. Wash. Emp. Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008) and *City of Union Gap v. Wash. State Dep't of Ecology*, 148 Wn. App. 519, 525-26, 195 P.3d 580 (2008).

In *Verizon Northwest*, 148 Wn. App. at 914-915, 194 P.3d 255, Verizon appealed the decision of the ALJ in favor of the Employment Security Department ("ESD") to the Commissioner of the ESD, who affirmed the ALJ and adopted all the "findings of fact" and conclusions of law. Importantly, the Supreme Court noted that the ALJ could not have made "findings of fact" because the case was decided at summary judgment, resting on questions of law and the undisputed facts. Because the Commissioner adopted the ALJ's summary judgment decision in whole, the Court analyzed the Commissioner's decision under the summary judgment standard, in the light most favorable to the nonmoving party. ***It evaluated the "facts in the administrative record de novo***." *Id.* at 916, 194 P.3d 255 (emphasis added).

In *City of Union Gap*, a company and a city together appealed the Department of Ecology's ("Ecology") denial of their application to transfer water rights at summary judgment to the Pollution Control Hearings Board (PCHB). The PCHB affirmed Ecology's decision at summary judgment. Unlike here, the agency did ***not*** make findings of fact and the material facts were not in dispute. The only question at issue was of law.

Instead, the WSLCB made ***findings of fact***, contradicting the previously undisputed facts it agreed upon and included in its briefing. CP 66 ("NOW, THEREFORE, IT IS HEREBY ORDERED that the Administrative Law Judge's Initial Order on Cross-Motions for Summary Judgment is MODIFIED and adopted as the ***Findings of Fact,*** Conclusions of Law and Final Order of the Board with the exception of the following . . . ." (emphasis added)); *cf.* CP 12-13 (ALJ's Initial Order on Cross-Motions for Summary Judgment with "Facts for Purposes of Summary Judgment" which include only "those facts for which the parties establish 'no genuine issue as to any material fact.'").

For example, the WSLCB struck the ALJ's Conclusion of Law 5.14 and added a new statement that had nothing to do with the law. The ALJ's Conclusion of Law 5.14 stated:

> It is undisputed that the Board has broad discretion by statute to determine the number of licenses available in each jurisdiction. RCW 69.50.354. The Board has previously allocated 556 marijuana retail licenses statewide. However, it has now apparently determined, without explanation, that this number of allotments is too high. The Board does not intend

> to issue any new licenses to replace those which have been cancelled or revoked.

CP 19. The WSLCB's Amended Final Order replaced the ALJ's conclusion with the following ***factual*** finding:

> There were only 222 retail marijuana licenses to award to Priority 1 applicants, and there were a total of 290 Priority 1 applicants. There were at least 222 other applicants who completed their application requirements prior to VRG. The Board issued all of the available licenses to applicants prior to VRG; thus, there were no more licenses available to be issued to VRG.

CP 68. Yet no evidence supports this key finding.

The WSLCB's new mislabeled "Conclusion of Law" 5.14 took disputed facts and recharacterized them as proven ones—which was both unsupported by any evidence and entirely improper on summary judgment. *See* AR 142 ("***The LCB admits that the agency has not filled all license allotments***." (emphasis added)); CP 15, ¶ 4.17 (as of September 10, 2019, there were only 481 active licenses, not the total 556).

Because the WSLCB made this finding of fact, it departed from summary judgment and made its Amended Final Order available for substantial evidence review. As the Supreme Court explicitly recognized in *City of Union Gap*, "the

substantial evidence standard applies . . . to an agency's findings of fact." 148 Wn. App. at 526, 195 P.3d 580. If the WSLCB had confined itself to only deciding questions of law, the Amended Final Order may not have been subject to substantial evidence review.[5] But it did not do so, and instead, the WSLCB made findings on disputed issues of fact. As a result, those factual findings underpinning the Amended Final Order must be reviewed under the substantial evidence standard. *See e.g., Stickney v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 11 Wn. App. 2d 228, 234, 453 P.3d 25 (2019) ("[The court] reviews the record to decide if substantial evidence supports the challenged findings of fact."); *City of Everett v. Pub. Emp. Rels. Comm'n*, 11 Wn. App. 2d 1, 14, 451 P.3d 347 (2019) ("We may grant relief from an agency decision and order if substantial evidence does not support the findings when viewed in light of the whole record." (internal punctuation omitted).)

[5] In cases where the summary judgment decision includes "findings of fact," courts review those findings under the substantial evidence standard. *See, e.g., Wash. State Dairy Fed'n v. State*, 18 Wn. App. 2d 259, 273-74, 490 P.3d 290 (2021).

The WSLCB cannot insert additional findings of fact into a review of the ALJ's summary judgment order, pretend those factual findings are "undisputed" (contrary to the record), and insulate them from substantial evidence review. To permit an agency to alter the facts and to make findings without any evidentiary support, as the Opinion blesses here, seriously undermines the purpose of the APA and substantial evidence review. The WSLCB went beyond conclusions of law to evaluate and find disputed facts, and because it did so, substantial evidence review must apply to its Amended Final Order and decisions.

2. The Court failed to review the WSLCB's factual findings for substantial evidence.

Relying on the justifications discussed above, the Court refused to review the Amended Final Order of the WSLCB and agency record for substantial evidence. If the Court had done so, the Court would have found it relied on inaccurate factual findings, including the Statement of Intent to Withdraw and the same false justification contained within it.

The first paragraph of the Amended Final Order states: "On May 1, 2019, Licensing emailed a notice to all remaining Priority 1 applicants notifying them that the ***additional allotments had been filled*** and the remaining applications would be withdrawn." CP 65 (emphasis added). Later, the Amended Final Order reiterates this inaccurate statement, but characterized it as an undisputed fact. "The Board issued all of the available licenses to applicants prior to VRG; ***thus, there were no more licenses available to be issued to VRG***." CP 68, ¶ 5.14 (emphasis added).[6] The Amended Final Order concludes by "affirming" the Statement of Intent, CP 70, again resting on the false claim all "additional allotments had been filled," CP 72.

Just five months after revoking VRG's application, the WSLCB was forced to admit (in answering interrogatories

[6] The Court's Opinion states, without support, that the "WSLCB had issued all the retail licenses it intended to issue." Op. 19. Nothing in the Administrative Record supports this statement. The WSLCB never told VRG that it applied its discretion and decided not to issue all the available licenses—instead, it stated, repeatedly, that no more licenses were available. The WSLCB cannot rewrite their rationale after being called to accountability by VRG.

under oath) that 75 licenses remained available. AR 147-48. It also conceded that, contrary to the stated justification for revocation, additional licenses remained available in its Motion for Summary Judgment before the ALJ. AR 142 ("The LCB admits that the agency has not filled all license allotments."). And, as the communications from the WSLCB show, there were at least 21 license allotments that were never filled as of September 2020. CP 78. There is no evidence to support the WSLCB's statement that there were no licenses available. The only evidence in the record pertaining to the availability of licenses contradicts the WSLCB's assertion. Under the substantial evidence standard, the WSLCB's Amended Final Order fails and should be overturned.

B. The Court's conclusion that the WSLCB's Amended Final Order was not arbitrary and capricious contradicts precedent and the agency record.

1. The WSLCB failed to provide any legitimate explanation for withdrawing VRG's application.

The Opinion avers that the WSLCB's failure to provide any meaningful justification for its decision to withdraw VRG's

application does not meet the arbitrary and capricious standard. Op. 20. But this conclusion lacks any legal support and overlooks established Supreme Court precedent. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179, *correcting opinion*, 943 P.2d 265 (1997). Failing to provide a meaningful explanation for its action is quintessentially "unreasoning." *See id.* (failure to explain how the Board's decision and related action would accomplish the stated purpose was arbitrary and capricious).

The WSLCB generally cited two broad statutes and one regulation addressing its authority to evaluate all timely applications (RCW 69.50.331), to adopt rules such as fees for license applications (RCW 69.50.345(1)), and to deny, suspend, or cancel a marijuana license application or license if the license will not be in the best interest of the welfare, health, or safety of the people of the state (WAC 314-55-050(17)). None of these explain why the WSLCB withdrew VRG's application or explain how withdrawing VRG's application complies with these guiding laws.

Even after all the briefing and argument in this case, it remains unclear why the WSLCB withdrew VRG's application. The Court's Opinion echoes this confusion. First, the Court states the "WSLCB explained that it had determined that the issuance of the license would not be in the best interest of the welfare, health, or safety of the people of the state" pursuant to WAC 314-55-050(17). Op. 18-19. There is no support for this statement, and it is contradicted by the WSLCB's own argument. *See* Appellant's Opening Br. 28-29 (The WSLCB acknowledges VRG's application was "unprocessed by the Licensing Division and therefore unassessed for potential threats to public health or welfare."). Then the Court's Opinion goes on to say, "WAC 314-55-050 includes a list of non-exhaustive reasons why the WSLCB 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.***" Op. 18, n.13 (emphasis added). The Court does not identify whatever this "extra" reason might be. This contradicts the Court's previous conclusion that the application was not withdrawn because of any threat to the health, welfare, and safety of the people.

Op 18. It remains unclear why the WSLCB withdrew VRG's application.

Failing to explain, or even provide, a legitimate explanation for its action and Order is, by definition, arbitrary and capricious. This failure satisfies the arbitrary and capricious standard according to the Washington Supreme Court. VRG requests the Court reconsider its decision so that it complies with Supreme Court precedent.

2. The Court's conclusion that VRG did not present evidence that the WSLCB acted dishonestly contradicts the record.

VRG presented substantial evidence that the WSLCB did not act honestly. VRG presented evidence at summary judgment, sufficient to persuade the ALJ, and to the WSLCB in its Response to the WSLCB's Appeal that the WSLCB knowingly and intentionally misrepresented the number of licenses available. *See, e.g.*, AR 373 ("It is arbitrary and capricious because Licensing admitted that allotments remain. See, Licensing's Answers to Licensee Interrogatories at 1, 2, and 3."). Instead of addressing the discrepancies in the record,

the WSLCB ignored the contradictions between its statements and doubled down on its initial position (claiming no more licenses were available)—again, without any explanation. There can be no other way to interpret this than that the WSLCB was not honest about the remaining license allotments. Such action taken "without regard to the attending facts and circumstances" is arbitrary and capricious. Op. 20 (internal citations omitted) (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004)). The Court was incorrect to conclude that VRG failed to present this evidence.

3. The Court's conclusion that VRG had an opportunity to be heard before the WSLCB issued its Amended Final Order contradicts the record.

The Court's Opinion claims VRG had an opportunity to be heard and to present its case. Op. 20. It is true that VRG had an opportunity to be heard in response to the WSLCB's petition for review of the ALJ's Initial Order to the Board before the WSLCB issued its Final Order on February 18, 2020. But, critically, VRG did ***not*** have any opportunity to be heard before the WSLCB suddenly reversed its own "Final Order," with the

Amended Final Order on February 20, 2020 making contrary findings unsupported by the record.

While the WSLCB claims the first Final Order was issued by mistake due to a staff miscommunication, Appellant's Opening Br. 34, n.15, the evidence overwhelmingly indicates the WSLCB arbitrarily changed its mind. Before the Superior Court, the WSLCB explained that signatures are only "stamped" after the Board provides approval for the Order. CP 143. This necessarily means that the February 18 "Final Order"—the one adopting the ALJ's Initial Order—was approved by the WSLCB. The WSLCB never claimed the Order was approved in error, but that the "Final Order" was purportedly served in error. CP 144. Following the WSLCB's explanation, the WSLCB approved two competing versions of the Order,[7] one on February 18 and one on February 20. It raises the question why the WSLCB ***approved*** the Order adopting the ALJ's Initial Order in the first place. CP 143-44. The unescapable inference here is that the Board approved the

[7] Moreover, it is unclear which signature, the Final Order or the Amended Final Order, is a stamp—the signatures on the two Orders are clearly different. *Compare* CP 62 *with* CP 70.

Final Order, then, regretting its decision, arbitrarily reversed its decision two days later. The WSLCB did so without giving VRG any notice or opportunity to be heard. This is the definition of arbitrary and capricious. The Court's conclusion that VRG had the opportunity to be heard before the WSLCB issued its Amended Final Order is not supported by the record and provides yet another basis to find that Order was arbitrary and capricious.

III. CONCLUSION

For the foregoing reasons, VRG respectfully requests that the Court grant its motion for reconsideration of its decision terminating review. The WSLCB's Amended Final Order was not supported by substantial evidence, as required by RCW 34.05.570(3)(e), and it was arbitrary and capricious. As the Court recognized in the first part of its Opinion, there is relief available for VRG. Therefore, VRG requests the Court reconsider its decision and order the WSLCB to reinstate and evaluate VRG's application.

This document contains 3,872 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED on July 12, 2022.

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August 29, 2022 - 1:40 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Vision Research Group, LLC., Resp v. WA State Liquor and Cannabis Board, App (555760)

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A copy of the uploaded files will be sent to:

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Comments:

The Certificate of Service is attached to the back of the Petition for Review.

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