APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Pursuant to Rule 83.04, Respondent Missouri Department of Health and Senior Services ("DHSS") respectfully applies for transfer to the Supreme Court of Missouri.

I. Questions of General Interest and Importance

Whether the Court of Appeals's majority opinion contradicts the Supreme Court's opinion in *Frye v. Levy*, 440 S.W.3d 405 (Mo. 2014) and the plain language of DHSS regulations, by holding that DHSS must grant an operating license to medical marijuana facility applicants who "shall" have submitted, but failed to do so, all required application materials under 19 C.S.R. 30-95.040—a mandatory regulation that expressly penalizes incomplete applications with denial—even where DHSS had sent a deficiency notice to an incomplete applicant under subsection (1)(B).4—a directory provision that does not use "shall" to describe DHSS's notice duties or prescribe the result that follows if DHSS did not sufficiently specify all missing items?

Whether DHSS must award more than the number of medical marijuana cultivation facility licenses the agency was permitted to issue and already has issued under 19 C.S.R. 30-95.050 by issuing Appellant a license, as well as potentially to other applicants who had not complied with the same minimum application requirements in 19 C.S.R. 30-95.040?

II. Missouri Appellate Authority Contrary to the Majority Opinion

Frye v. Levy, 440 S.W.3d 405 (Mo. 2014)

Bauer v. Transitional Sch. Dist. of City of St. Louis, 111 S.W.3d 405 (Mo. 2003)

Hedges v. Dep't of Soc. Servs. of Missouri, 585 S.W.2d 170 (Mo. App. 1979)

REASONS FOR GRANTING TRANSFER

Statement of Facts. On December 26, 2019, DHSS denied Appellant MO CANN DO's ("MCD") application for a medical marijuana cultivation license because MCD did not attach a certificate of good standing with its application. DHSS regulation 19 C.S.R. 30-95.040 contains a certificate-of-good-standing requirement, and it states, in relevant part:

> (2) Application Requirements. Facilities must obtain a license or certification to cultivate, manufacture, dispense, test, and transport medical marijuana in Missouri. All applications for facility licenses or certifications and for renewals of licenses or certifications shall include at least the following information:
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> (B) Legal name of the facility, including fictitious business names, and a certificate of good standing from the Missouri Office of the Secretary of State[.]

MCD previously had submitted an application before DHSS's final denial. That first application did not include a certificate of good standing or certain other items. After MCD's first attempt, DHSS sent a deficiency notice to MCD informing the company that its application was incomplete. DHSS's deficiency-notice requirement is found in subsection (1)(B).4 of 19 C.S.R. 30-95.040, which states that "[t]he department will notify an applicant if an application is incomplete and will specify in that notification what information is missing." Here, DHSS's deficiency notice did not specifically isolate MCD's lack of a certificate of good standing, but the notice did state that "[a]ny applications with missing information upon the department's second review, as required by 19 CSR 30.95.040 and 19 CSR 30-95.025(4), will be considered incomplete and must be denied[.]"

MCD's second application submission corrected some deficiencies from the first submission, but it did not include a certificate of good standing. DHSS then denied MCD's application. In its denial letter, DHSS informed MCD that it ranked below other facilities that DHSS scored in the competitive application process. At the time MCD submitted its application and when DHSS denied it, 19 C.S.R. 30-95.050(1)(A) imposed a 60-license ceiling on cultivation facilities in Missouri. That cap was later increased to 62 licenses after the decennial census numbers were released on April 26, 2021. DHSS has awarded those licenses.

MCD challenged DHSS's denial by filing a complaint with the Administrative Hearing Commission (AHC). On October 29, 2020, the AHC upheld DHSS's denial. MCD then sought review of the AHC's decision in St. Louis County Circuit Court. On May 23, 2022, the Circuit Court affirmed the AHC's decision and upheld DHSS's denial. MCD appealed that decision to the Court of Appeals.

A majority of a division of the Court of Appeals reversed. It ultimately recognized, as did DHSS, the AHC, and the Circuit Court, that MCD did not turn in a complete application with a certificate of good standing. Nevertheless, the majority held that DHSS must grant MCD a license because "DHSS failed to uphold this obligation to MCD when it did not include in the deficiency letter a specific reference to MCD's missing certificate of good standing," thus not complying with subsection (1)(B).4. (Slip Op. at 6). The majority held that "the manifest intent of 19 C.S.R. 30-95.040(1)(B).4, by requiring the DHSS to issue deficiency letters that specify missing items in an application, is that applications be complete and decided on their merits." (Slip Op. at 7).

Judge Broniec, in dissent, reasoned that *Frye v. Levy*, 440 S.W.3d 405 (Mo. 2014) controls, because "'shall' means 'shall, and this word unambiguously indicates a command or mandate,'" (Broniec, J. dissenting at 2, quoting *Frye*, 440 S.W.3d at 408 (cleaned up, internal quotations omitted)) and "agency rules are interpreted under the same principles used to interpret statutes," *id*. The dissenting opinion reasoned that 19 C.S.R. 30-95.040(2) uses "shall" to describe an applicant's duty to submit a complete application and that DHSS's regulations require a certificate of good standing. (*See id.* at 5-6). The dissenting opinion contrasted that provision with 19 C.S.R. 30-95.040(1)(B).4, which uses the word "will" to describe DHSS's duty to send an application-deficiency notice and does not provide a sanction if DHSS does not sufficiently specify all missing application items. (*Id.* at 5-8).

DHSS respectfully seeks post-opinion transfer under Rule 83.04.

Legal Basis Upon Which Respondent Seeks Transfer. The majority opinion errs in two principal ways that provide grounds for this Court to transfer this case.

First, the opinion contravenes established Missouri Supreme Court precedent, *see Frye*, 440 S.W.3d at 408, by construing one DHSS regulatory provision as directory in nature when it is mandatory, and by construing another provision as mandatory in nature when it is directory. That construction imposes a sanction against DHSS (granting a license) not found in the plain text of DHSS's regulations, even though 19 C.S.R. 30-95.040(1)(F).3 penalizes applicants who submit incomplete applications with a denial.

Second, the majority opinion will likely require DHSS to grant not just MCD a medical marijuana facility license, but potentially to other denied applicants. DHSS

estimates there are two other entities in the exact posture as this matter, and many more with analogous situations. But even just requiring DHSS to grant MCD a license exceeds the permissible cap on licenses under 19 C.S.R. 30-95.050. DHSS has already granted the maximum number of licenses under the regulation.

A. The majority opinion conflicts with this Court's distinction between "mandatory" and "directory" legal requirements by requiring DHSS to grant licenses to entities who do not follow the plain language of application-requirement regulations, which impose a clear penalty for noncompliance: denial of an incomplete application.

This Court has stressed the distinction between mandatory and directory obligations; contrary to the majority opinion of the Court of Appeals, that analysis applies equally to statutes *and* regulations. DHSS's regulation here is mandatory when it speaks to applicants' duties to submit a complete application, and directory when it speaks to DHSS's deficiency-notice obligations.

In *Frye*, this Court held that "[w]hen the legislature imposes a deadline or other mandate, this Court has held that courts have no authority to impose a sanction for noncompliance when the legislature has chosen not to do so." *Frye*, 440 S.W.3d at 408. So, in *Frye*, this Court vacated a lower court's decision barring a state agency from making determinations on complaints under investigation after a statutory time limit had passed, because "if the legislature has not approved this sanction or otherwise indicated that this is the intended consequence of the Division's non-compliance in a given case, then the statute is a 'directory statute' and the trial court was wrong in creating this sanction on its own." *Id.* "If [statutes are] mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are

limited to what is required to be done." *Id.* at 409 (emphasis omitted) (quoting *Hudgins v. Mooresville Consol. Sch. Dist.*, 278 S.W. 769, 770 (Mo. 1925)).

Frye was certainly not the first opinion of this Court that analyzed directory and mandatory legal obligations. *See Bauer v. Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405 (Mo. 2003) (considering presence of absence of a penalty provision, context, and legislative intent); *Sw. Bell Tel. Co. v. Mahn*, 766 S.W.2d 443 (Mo. 1989) (reading a statute one way to permit assessment of a new tax rate "would lead to an absurd result," "directly conflict with the statute as worded," and "permit a discretionary decision" for something intended to be "a ministerial duty.").

The Western District of Court of Appeals has applied this construction to regulations, and the analysis in the Eastern District's majority opinion here erred by not applying the framework at all. In *Hedges v. Dep't of Soc. Servs. of Missouri*, 585 S.W.2d 170, 172 (Mo. App. W.D. 1979), the Western District reasoned that whether a requirement is directory or mandatory applies "by analogy [to] a requirement created by administrative regulation." In fact, *Hedges* concerned a regulation that required a state agency to issue a notice, but the agency did not issue the notice at all. *Hedges* held that the notice regulation was directory when "the regulation which is the only authority setting up the requirement specifies no penalty or consequence for nonnotification." *Id.* Thus, the Eastern District's majority opinion is contrary to the Western District's opinion in *Hedges* because the opinion here held that the directory-or-mandatory analysis does not apply to regulations.

The majority opinion distinguishes *Frye*'s applicability because that case "concerned a *statute* and the issue of legislative intent, neither of which is present here."

(Slip Op. at 7, emphasis in original). True, DHSS's regulations are not drafted by the legislature, but the same directory-or-mandatory analysis applies and the intent of DHSS's regulations is gleaned from the plain text of the rules. *See State ex rel. Stewart v. Civil Serv. Comm'n of City of St. Louis*, 120 S.W.3d 279, 287 (Mo. App. E.D. 2009) (regulations are to be interpreted using the same principles used when interpreting statutes).

Because *Frye* and the directory-or-mandatory analysis must apply here, the majority opinion erred in its construction of 19 C.S.R. 30-95.040. The missing-information requirement for DHSS's defiance notices in 19 C.S.R. 30-95.040(1)(B)(4) is directory, not mandatory. Nothing in that regulation's plain text or context suggests that DHSS intended to grant a license if the agency did not itemize each missing document in an applicant's first submission.

19 C.S.R. 30-95.040(2) describes exactly what materials that applicants must submit. It mandates that applicants "shall include at least the following information: . . . (B) legal name of the facility, including fictitious business names, and a certificate of good standing from the Missouri Office of the Secretary of State[.]" Under *Frye*, that is a mandatory obligation. Looking at 19 C.S.R. 30-95.040 as a whole, subsection (2) uses "shall" to describe what is required, and then subsection (1)(F).3 imposes the penalty for noncompliance: "If an applicant fails to provide a complete application within seven (7) days of being notified that an application is incomplete, the license or certification for which the applicant is applying will be denied." Here, DHSS did notify MCD that its application "is incomplete"; the sanction for that is that the application "will be denied."

When looking at the context of DHSS's regulations, as the dissenting opinion noted, "DHSS knew how to draft a sanction for an applicant's failure to provide a complete application after being notified of a missing item." (Broniec, J., dissenting at 5). The majority opinion conflicts with *Frye* and the plain text of the 19 C.S.R. 30-95.040 by construing directory provisions as mandatory and mandatory provisions as directory.

The majority opinion also overlooks other important context guiding the interpretation of DHSS's regulations. First, when Missourians passed Article XIV, Section 1, they created in the Missouri Constitution a burgeoning but highly-regulated industry. That provision authorizes DHSS significant authority to properly regulate the industry. Mo. Const. Art. XIV, § 1.3(b) ("Promulgate rules and emergency rules necessary for ***the proper regulation and control*** of the cultivation, manufacture, dispensing, and sale of marijuana for medical use and for the enforcement of this section so long as patient access is not restricted unreasonably and such rules are reasonably necessary for patient safety or ***to restrict access to only licensees*** and qualifying patients.") (Emphasis added). Application requirements are clearly set forth in Article I, § 14 and DHSS regulations. Those requirements protect the public by ensuring that participants in this new industry can follow simple, but important, instructions. Even the majority opinion recognized that MCD did not ultimately submit a certificate of good standing.

And as discussed more below, the majority opinion requires DHSS to exceed a cap on the number of licenses issued to medical marijuana cultivation facilities. That result contravenes guiding principles of the limited medical marijuana licensure system contained in the Missouri Constitution.

B. The majority opinion might require DHSS to exceed the cap on authorized licenses, contrary to the plain text of the agency's regulations.

The division's majority opinion may have unintended consequences in that it might require DHSS to grant not just MCD a medical marijuana facility license, but also to other denied applicants. DHSS believes there are two other cases in an identical posture: the specific document deficiency error may not have been stated in the rejection notice *and* the entity would have likely scored high enough in the competitive licensure-scoring regime. The majority opinion appears to be generalizable to similarly-situated cases. As the majority opinion notes in a footnote: "Among the other applications scored at that time, MCD's application ranked sixty-second. Later, after the DHSS increased the number of available licenses from sixty to sixty-two as a result of the 2020 census, the DHSS awarded the additional licenses to the sixty-first and sixty-third ranked applicants. MCD was bypassed because of its incomplete application." (Slip op. at 4. n.3).

But when MCD submitted its application *and* when DHSS denied it, 19 C.S.R. 30-95.050(1)(A) imposed a 60-license ceiling. That cap was only *later* increased to 62 licenses after the decennial census numbers were released on April 26, 2021. DHSS has awarded those licenses.

In addition to those other two cases, there are many other pending cases at the AHC or circuit court where the particular document deficiency may not have been itemized in DHSS's rejection notice under the majority's interpretation of the extent of specificity that 19 C.S.R. 30-95.040(1)(B).4 requires, but which likely would not have scored high enough. Presently, DHSS's best information is that there are dozens of other cases in this posture.

While the majority's opinion notes that MCD's "application did not rank high enough to be eligible for one of the sixty available cultivation facility licenses" (Slip Op. at 4), the ultimate relief ordered does not appear to rest on the total number of licenses available under 19 C.S.R. 30-95.050.

It is of general interest and importance for this Court to provide clarity on this question, especially for industries where only certain numbers of licenses can be awarded. The medical marijuana industry is not the only one where this issue matters. Under the *new* Missouri Constitution amendment concerning *recreational* marijuana, other license caps may be imposed. For example, Article XIV, § 2 states that DHSS "may restrict the aggregate number of licenses granted for marijuana microbusiness facilities" subject to a minimum amount that must be issued. And in another regulated industry, in 2008 Missouri voters passed by ballot initiative a measure that imposes a statutory cap on the number of excursion gambling boat licenses: "the Missouri gaming commission shall not authorize additional excursion gambling boat licenses after November 4, 2008, that exceed the number of licenses which have been approved for excursion gambling boats already built and those under construction" § 313.780, RSMo. Even assuming that the majority opinion correctly analyzed DHSS's deficiency-notice obligations and applicants' application requirements, the license cap in 19 C.S.R. 30-95.050(1)(A) should foreclose the remedy of awarding a license. Otherwise, license caps in a regulated industry may mean nothing at all.

CONCLUSION

For these reasons, Respondent Department of Health and Senior Services respectfully requests that this Court grant transfer under Rule 83.04.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, the Application for Transfer with all attachments were served by electronic mail upon the following counsel of record:

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