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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13

15 **EMERALD ACRES CORPORATION, a**
California corporation, and JOSEPH
16 **NIEVES, an individual,**

17 **Petitioners,**

18 **v.**

19 **CALIFORNIA DEPARTMENT OF FOOD**
AND AGRICULTURE (CDFA);
20 **TABATHA CHAVEZ, in her official**
capacity as Chief, Compliance and
21 **Enforcement Branch of the CDFa, KAREN**
22 **ROSS, in her capacity as Secretary of the**
CDFa, and Does 1-10,
23
24 **Respondents.**

Case No. RG21098348

**OPPOSITION TO REQUEST FOR
PRELIMINARY INJUNCTION**

Date: June 17, 2021
Time: 3:30 p.m.
Dept: 17
Judge: Hon. Frank Roesch

Trial Date: TBD
Action Filed: May 17, 2021

BY FAX

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1 Respondents California Department of Food and Agriculture (“CDFA”), Tabatha Chavez,
2 in her official capacity as Chief, Compliance and Enforcement Branch of the CDFA, and Karen
3 Ross, in her official capacity as Secretary of the CDFA (collectively, “Respondents”), submit the
4 following memorandum of points and authorities in opposition (“Opposition”) to Emerald Acres
5 Corporation (“Emerald Acres”) and Joseph Nieves’ (“Nieves”) (collectively, “Petitioners”)
6 Showing Cause Why a Preliminary Injunction Should Issue (“Request for Injunction”).

7 **I. INTRODUCTION**

8 Petitioners seek to reverse CDFA’s March 4, 2021, revocation of Emerald Acres’
9 provisional cultivation license which was set to expire May 29, 2021, and further, to reverse
10 CDFA’s May 27, 2021, denial of renewal (or revocation) of Emerald Acres’ next provisional
11 cultivation license that would cover May 30, 2021 to May 29, 2022. Petitioners’ claims lack
12 merit and their preliminary injunction motion should be denied. First, Petitioners seek a
13 preliminary injunction to prevent the execution of a public statute by public officers for the public
14 benefit, which is generally not viable according to preliminary injunction statutes and case law.
15 Second, even if the request for preliminary injunction is not precluded by statutes and case law,
16 Petitioners cannot meet the elements of a request for preliminary injunction, as (1) Petitioners
17 have failed to demonstrate that they will suffer the requisite specific or sufficient harm to justify
18 injunctive relief, and (2) Petitioners cannot show a likelihood of success on the merits of their
19 claims, because the actions and statute they challenge are consistent with law and CDFA acted
20 within its discretion.

21 **II. STATEMENT OF FACTS**

22 **A. Regulatory Violations Leading to CDFA’s March 4, 2021 Revocation of** 23 **Emerald Acres’ Provisional License Set to Expire May 29, 2021**

24 On December 22, 2020, CDFA appeared for a California Cannabis Track-and-Trace-
25 METRC (“CCTT-Metrc”) inspection for licensee Emerald Acres at Emerald Acres’ licensed
26 premises located at 1478 Hyampom Road, Hayfork, CA 96041 (“Premises”). (Declaration of
27 Rhoads (“Dec. of Rhoads”), paras. 2 and 6.) CCTT-Metrc is the track-and-trace system used to
28 track commercial cannabis activity and movement through the commercial cannabis supply chain

1 (“seed-to-sale”). (Dec. of Rhoads, para. 2.) A CCTT-Metric inspection is an onsite inspection to
2 reconcile what has been entered into the CCTT-Metric system by a licensee with the cannabis and
3 cannabis products onsite of a licensed premises. (Dec. of Rhoads, para. 2.) Generally, a CCTT-
4 Metric inspection is performed on a licensed cultivator, nursery, or processor approximately once
5 a year. (Dec. of Rhoads, para. 3.) Emerald Acres had not yet received a CCTT-Metric inspection
6 (Emerald Acres received their provisional cultivation license on May 29, 2020). (*Ibid.*) CDFA,
7 CalCannabis Cultivation Licensing Division, Compliance and Enforcement Branch, Special
8 Investigator Misty Rhoads presented at the Premises along with Trinity County Sheriff’s Office
9 (“TCSO”), which had a search warrant for the Premises and was investigating a homicide that
10 had occurred at the Premises. (Dec. of Rhoads, para. 6.)

11 CDFA identified numerous cannabis regulation violations during the December 22, 2020
12 CCTT-Metric inspection. (Dec of Rhoads, paras. 7-35; Exhibits 3-6 and 8-12.) In summary,
13 CDFA found that 1,643 cannabis plants, two packages of cannabis flower weighing 52 pounds,
14 and 969.3525 pounds of harvested and unpackaged cannabis material that was entered into the
15 CCTT-Metric system as still being in possession of Emerald Acres was not on the Premises. (Dec
16 of Rhoads, paras. 8-20; Exhibits 3-6.) Further, CDFA identified additional regulation violations
17 such as: failing to have staff on the licensed premises during the declared hours of operation;
18 failing to attach Unique Identifiers (“UID”) (a UID is an alphanumeric code or designation used
19 to uniquely identify cannabis and cannabis products at a particular licensed premises) to cannabis
20 and cannabis products; not entering into the CCTT-Metric system that certain onsite present
21 cannabis plants had been harvested; reporting into the CCTT-Metric system that UID tags had
22 been attached to cannabis plants when in fact they had not; and failing to have certain required
23 records on the Premises. (Dec of Rhoads, paras. 21-35; Exhibits 8-12.)

24 Although Petitioners state that Nieves was incarcerated from on or about December 11,
25 2020 to on or about February 9, 2021, and it was during that time Emerald Acres’ cannabis
26 property was taken from the Premises, Nieves did not notify CDFA of the missing cannabis
27 plants, packages, and cannabis until March 19, 2021, or approximately forty days after he was
28 released from jail. (Request for Injunction, page 6, lines 10-23; Dec. of Rhoads, para. 19; Exhibit

1 7.) This was far past the regulatory requirement that a licensee notify CDFA within three
2 calendar days of discovery of any diversion, theft, loss of, or criminal activity related to a
3 licensee's cannabis or non-manufactured cannabis products. For details regarding notice of the
4 CCTT-Metric inspection to Emerald Acres, and CDFA's investigation and regulation violation
5 findings, please reference the Declaration of Misty Rhoads filed in Support of the Opposition,
6 incorporated herein.

7 **B. Regulatory Violations Leading to CDFA's May 27, 2021 Denial of Renewal**
8 **(or Revocation) of Emerald Acres' Next Provisional License That Would**
9 **Cover May 30, 2021 to May 29, 2022**

10 As the Court is aware, on May 21, 2021, the Court ordered that Respondents be
11 "prohibited from acting upon Respondents' revocation letter issued on March 4, 2021 against"
12 Emerald Acres' provisional cultivation license set to expire May 29, 2021 until further order of
13 the Court. (Court's May 21, 2021 Order, para. 1.) In compliance with the Order, on May 21,
14 2021, CDFA reactivated Emerald Acres' provisional cultivation license set to expire May 29,
15 2021 in the online Licensing System so that it could continue to operate under that license until
16 further order of the Court. (Declaration of Dana Eagle ("Dec. of Eagle"), para. 2.) By
17 reactivating the provisional license, Petitioners were able to submit an application through the
18 online Licensing System to renew Emerald Acres' provisional license. (Dec. of Eagle, para. 3.)
19 In submitting the renewal application, Petitioners submitted an attestation that all the information
20 provided to CDFA is accurate and current, including information that Emerald Acres has local
21 authorization to engage in commercial cannabis activity. (*Ibid.*) In addition, Petitioners did not
22 upload any documentation to the online Licensing System regarding any changes that had
23 occurred to the information originally submitted to CDFA. (*Ibid.*) As a result of its
24 representations and attestation, Emerald Acres' provisional cultivation license was renewed as a
25 provisional cultivation license that would cover May 30, 2021 to May 29, 2022. (Dec. of Eagle,
26 para. 3.)

27 The information Petitioners had provided to the CDFA in the online Licensing System,
28 however, was not accurate and current as Petitioners had attested. (Declaration of Anthony,
Exhibit B.) Petitioners were not in possession of a local cultivation license at the time they

1 entered their license renewal information on May 21, 2021 into the online Licensing System for
2 the provisional cultivation license that would cover May 30, 2021 to May 29, 2022.¹ (*Ibid.*) The
3 renewal of the provisional cultivation license that would cover May 30, 2021 to May 29, 2022
4 would not have been issued if Petitioners' representations in the online Licensing System had
5 accurately stated that Petitioners were not in possession of a local cultivation license at the time.
6 (Dec. of Eagle, para. 4.) Further, the renewal of the provisional cultivation license that would
7 cover May 30, 2021 to May 29, 2022 was intended to be denied by CDFA due to the previously
8 cited regulatory violations identified on December 22, 2020 (cited above), and for which
9 Petitioners were provided notification on March 4, 2021. (Dec. of Eagle, para. 5.) Petitioners'
10 false attestations and failure to upload accurate information of the revocation of its local
11 authorization is further grounds to deny their renewal application. (Dec. of Eagle, para. 3.)

12 **C. Annual License v. Provisional License**

13 Emerald Acres held, and currently holds per this Court's order, a provisional cultivation
14 license, not an annual cultivation license. (Request for Injunction, page 5, lines 12-14.)

15 In 2018, Business and Professions Code section 26050.2, was enacted and gave CDFA
16 discretion to "issue a provisional license to an applicant if the applicant has submitted a
17 completed license application to the licensing authority...." (Bus. & Prof. Code, § 26050.2, subd.
18 (a).)² To obtain a provisional license the applicant must submit a completed license application
19 with proof that California Environmental Quality Act ("CEQA") and local ordinance compliance
20 is underway (Bus. & Prof. Code, § 26050.2, subd. (a)), and work diligently to obtain the annual
21 license, including but is not limited to, submitting all required documents, completing background
22 checks. (Bus. & Prof. Code, § 26050.2, subd. (d).) The issuance of a provisional license confers
23 a conditional privilege on annual license applicants that may be revoked if an applicant fails to
24 diligently pursue the requirements for licensure and that terminates automatically upon issuance

25 _____
26 ¹ The Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA")
27 provides that commercial cultivation activity is not unlawful under State law if it is "permitted
28 pursuant to a state license... [and] permitted pursuant to a local authorization, license, or permit
issued by a local jurisdiction." (Bus. & Prof. Code, § 26032, subd. (a).)

² All references are to the Business and Professions Code, unless otherwise indicated.

1 or denial of an annual license application. (Bus. & Prof. Code, § 26050.2, subs. (d) and (e).)
2 Provisional licenses last for 12 months and can be issued through the end of 2021, and as of
3 January 1, 2022 section 26050.2 will be repealed by statute. (Bus. & Prof. Code, § 26050.2,
4 subs. (b) and (i).

5 In comparison, a commercial cannabis annual license is granted only after all of the
6 requirements for licensure have been completed. (Bus. & Prof. Code, §§ 26051.5 and 26055.)
7 An annual cultivation license applicant must satisfy certain requirements including; a complete
8 list of all financial interest holders, evidence of enrollment in the State Water Resources General
9 Order, documentation of water sources, evidence that the applicant has conducted a hazardous
10 materials record search for the proposed premises, evidence of compliance or exemption from
11 CEQA, a copy of lake or streambed alteration agreement or notice of exemption for such an
12 agreement from the Department of Fish and Wildlife, an attestation that the applicant is an
13 agricultural employer, and that the licensee has entered into a labor peace agreement. (Cal. Code
14 Regs., tit. 3, § 8102.) It is only after all required materials have been received by CDFA that the
15 agency can make a determination about whether the applicant is a qualified applicant for an
16 annual license. (Bus. & Prof. Code, §§ 26051.5 and 26055; Cal. Code Regs., tit. 3, § 8102.) If all
17 requirements are satisfied and an annual license is issued, an annual license is valid for one year
18 and is renewable each year, for an indefinite period of time. (Bus. & Prof. Code, § 26050, subd.
19 (c).) If the annual license application is denied, the applicant can request a hearing regarding
20 CDFA's decision. (Bus. & Prof. Code, § 26058.)

21 **III. ARGUMENT**

22 **A. The Public Interest Weighs Against the Issuance of a Preliminary Injunction** 23 **and a Preliminary Injunction Should Not Prevent Execution of Public Statute by** 24 **Public Officers for the Public Benefit**

25 When a petitioner seeks to enjoin public officers and agencies in the performance of their
26 duties, the public interest must be considered. (*Tahoe Keys Property Owners' Assn. v. State*
27 *Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472-1473.) The moving party must
28 make a higher showing of irreparable injury because "[t]here is a general rule against enjoining

1 public officers or agencies from performing their duties.” (*Id.*, at p. 1471.) Moreover, a
2 preliminary injunction may not prevent “execution of a public statute by officers of the law for
3 the public benefit”; nor “the exercise of a public or private office, in a lawful manner by the
4 person in possession.” (Code Civ. Proc., § 526, subs. (b)(4) and (6); Civ. Code, § 3423, subs.
5 (d) and (f).)

6 In *Cohen v. Board of Supervisors* (1986) 178 Cal.App.3d 447, the Court of Appeal, First
7 District reviewed Code of Civil Procedure section 526 and Civil Code section 3423 stating:

8 While these general strictures do not preclude the issuance of
9 preliminary injunctive relief when the constitutionality of a statute
10 or ordinance is challenged, nevertheless, ‘... **trial courts should be**
11 **extremely cautious ... to enjoin law enforcement officials from**
12 **enforcing an ordinance obviously approved and adopted by**
13 **duly elected representatives of the people for the purpose of**
14 **promoting and protecting public morality prior to a trial on the**
15 **merits.’ [Citations.]**

16 (*Id.*, at p. 453.)

17 Here, the revocation and denial of Petitioners’ provisional cultivation license was an
18 “execution of a public statute by officers of the law for the public benefit.” First, section 26050.2
19 is a “public statute” that permits provisional license revocation, suspension, and denial of renewal
20 at the discretion of the CDFA at any time. Second, Petitioners’ provisional cultivation license
21 was revoked “by officers of the law for the public benefit.” A CDFA investigation found that
22 Petitioners had failed to comply with multiple provisions of applicable law and implementing
23 regulations; thus, negatively impacting protection of the public by permitting a significant amount
24 of cannabis and cannabis products to enter the illegal market and failing to properly tag, identify,
25 and record its cannabis and cannabis products to permit proper regulation and oversight, as stated
26 below. (Dec. of Rhoads, paras 7-34.) The Court should decline to issue a preliminary injunction
27 preventing CDFA from performing its regulatory enforcement duties for the public benefit.

28 **B. Applicable Legal Standard for a Preliminary Injunction**

If the Court does not find that a preliminary injunction is precluded by Code of Civil
Procedure section 526, subdivisions (b)(4) and (6), and Civil Code section 3423, subdivisions (d)

1 and (f), then the applicable legal standard is as follows, “[T]rial courts should evaluate two
2 interrelated factors when deciding whether or not to issue a preliminary injunction. The first is
3 the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm
4 that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the
5 defendant is likely to suffer if the preliminary injunction were issued.” (*White v. Davis* (2003) 30
6 Cal.4th 528, 554.) A party seeking a preliminary injunction may not just allege any harm or
7 damages, the “extraordinary remedy of injunction cannot be invoked without showing a
8 likelihood of irreparable harm.” (*Intel Corp v. Hamidi* (2003) 30 Cal.4th 1342, 1352.)

9 **C. Petitioners Cannot Demonstrate Adequate Irreparable Harm**

10 Petitioners’ Request for Injunction fails at the threshold for failure to submit evidence of
11 irreparable harm. Petitioners allege that they “face the irreparable loss of the 2021 growing
12 season as well as extensive and existential damage to their business if they are not permitted to
13 continue operating.” (Request for Injunction, page 8, lines 18-19.)

14 Injunctive relief “requires a showing ‘that the defendant’s wrongful acts threaten to cause
15 irreparable injuries, ones that cannot be adequately compensated in damages.’” (*Balboa Island
16 Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1168.) Petitioners have failed to allege that
17 they will suffer any irreparable harm because they have not demonstrated that their injuries
18 cannot be adequately compensated with damages. The loss of anticipated revenue is not
19 irreparable harm and is not a potential injury which warrants injunctive relief.

20 If Petitioners wish to allege that the revocation and denial of renewal of the provisional
21 cultivation license is the deprivation of a property interest amounting to irreparable harm, that
22 argument also fails because, as discussed below, there can be no federally protected interest in the
23 privilege to commercially cultivate cannabis. In addition, the issuance of the statutorily defined
24 provisional license does not constitute the conferral of a property interest under California law.
25 Petitioners have been deprived of a conditional privilege that is identified in statute and have not
26 lost anything Petitioners had an absolute right to retain.

27 In comparison, the harm to Respondents, and in turn the public safety, if a preliminary
28 injunction is granted is twofold: (1) the loss of the authority and discretion granted by the

1 Legislature which is necessary to protect the public health and safety; and (2) the inability to take
2 immediate action against a provisional license holder who has not complied with the laws,
3 regulations, and rules that govern their conduct. CDFA is tasked with exercising discretion in:
4 issuing or denying licenses, authorizing applicants to conduct business prior to issuance of an
5 annual license under a provisional license, and revoking or suspending provisional licenses.
6 (Bus. & Prof. Code, § 26050.2.) The statutorily mandated principle for the exercise of this
7 discretion is “. . . protection of the public shall be the highest priority. Whenever the protection of
8 the public is inconsistent with other interests sought to be promoted, the protection of the public
9 shall be paramount.” (Bus. & Prof. Code, § 26011.5.)

10 Petitioners repeatedly dismiss the regulatory violations cited as “technical” regulatory
11 issues. (Request for Injunction, page 15, lines 20-21; page 16, lines 6-8; page 16, lines 20-25.)
12 However, the regulatory violations are not merely “technical,” they are serious and are critical
13 mechanisms to: assure that products are safe for consumption; track the transport and movement
14 of cannabis and cannabis products, including the chain of custody from cultivator to customer;
15 regulate packaging, labeling, and accurate taxation of cannabis for the state; and, minimize the
16 illegal market and track the growth of the legal market. (Dec. of Rhoads, para. 2.)

17 Here, Nieves waited almost a month and a half after his release from incarceration to
18 notify CDFA of the alleged theft of Emerald Acres’ 1,643 cannabis plants, two packages of
19 cannabis flower weighing 52 pounds, and 969.3525 pounds of harvested and unpackaged
20 cannabis material. (Dec. of Rhoads, paras. 9 and 19.) This loss and then delay in reporting the
21 loss permitted the unregulated and untested cannabis to be diverted and enter the illegal market,
22 and potentially harm the public. (Dec. of Rhoads, paras. 19 and 20.) Petitioners failed to have
23 staff on the licensed premises during the declared hours of operation. (Dec. of Rhoads, para. 22.)
24 This can prevent a licensing agency from maintaining the ability to inspect licensees’ premises to
25 verify that the licensee is in compliance with regulations. (Dec. of Rhoads, para. 23.) Petitioners
26 failed to attach UIDs to cannabis and cannabis products. (Dec. of Rhoads, para. 28.) This causes
27 CDFA to lose the ability to track the lifespan of cannabis and cannabis products when held by one
28 licensee and track the cannabis and cannabis products when they are transferred from one

1 licensee to another and the ability to identify the physical cannabis with what was entered into the
2 CCTT-Metric system. (Dec of Rhoads, para. 29.) Petitioners failed to enter into the CCTT-Metric
3 system that certain onsite present cannabis plants had been harvested. (Dec. of Rhoads, para. 31.)
4 This causes CDFA to lose the tracking of development of cannabis at a licensed premises prior to
5 sale to the public and may cause diversion of cannabis and cannabis product to the illegal market.
6 (Dec. of Rhoads, para. 32.) Petitioners reported into the CCTT-Metric system that UID tags had
7 been attached to cannabis plants when in fact they had not. (Dec. of Rhoads, para. 34.) This
8 renders those plants untraceable and subject to being diverted into the illegal market. (Dec. of
9 Rhoads, para. 35.) Last, Petitioners failed to have certain required business records on the
10 Premises. (Dec of Rhoads, paras. 25.) This prevented CDFA from cross-referencing invoices
11 and other business records with information reported in the CCTT-Metric system for an accurate
12 audit and complete tracking of Petitioners' inventory and commercial cannabis activity. (Dec of
13 Rhoads, paras. 25-26.)

14 Petitioners' entirely dismissive attitude towards the largescale theft, and diversion, of
15 cannabis and cannabis products from the Premises demonstrates that they are not worthy of
16 holding even a provisional license. The harm to CDFA and the public in allowing a recalcitrant
17 licensee to continue to operate greatly outweighs any monetary harm to Petitioners.

18 **D. Petitioners Cannot Show Any Probability of Prevailing On the Merits**

19 Writ relief under Code of Civil Procedure section 1085 requires meeting three threshold
20 elements: 1) a beneficial interest or right of the petitioner; 2) a ministerial duty which may be
21 compelled by the Courts to protect the beneficial interest or right, and 3) a showing that there is
22 no plain adequate remedy at law. (Code Civ. Proc., § 1085; *Orange Unified School Dist. v.*
23 *Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 765.) Petitioners cannot
24 satisfy these requirements.

25 **1. Petitioners Do Not Have a Beneficial Interest or Right in a Provisional**
26 **License**

27 **a. Requirements for a Federal Due Process Claim Are Not Met**

28 Petitioners fail to allege a viable Fourteenth Amendment due process claim because they

1 have not identified any right or interest that is protected under the Federal Constitution. It is
2 illegal to cultivate cannabis commercially or for a private person to possess cannabis for any
3 purpose under federal law. (21 U.S.C. §§ 812(c), 841(a)(1), and 844(a); *see also Gonzales v.*
4 *Raich* (2005) 545 U.S. 1, 27; *United States v. Jeffers* (1951) 342 U.S. 48, 53.) “Procedural due
5 process, as required by the United States Constitution, protects only those matters that may be
6 construed as liberty or property interests.” (*Conejo Wellness Center, Inc. v. City of Agoura Hills*
7 (2013) 214 Cal.App.4th 1534, 1562.) Federal law recognizes no right to engage in commercial
8 cannabis activities, therefore there is no cognizable property interest sufficient to support a
9 federal due process claim. All claims made by Petitioners that are supported by a federally
10 protected property interest are not viable.

11 Further, Supreme Court “cases recognize that a benefit is not a protected entitlement if
12 government officials may grant or deny it in their discretion.” (*Town of Castle Rock* (2005) 545
13 U.S. 748, 749.) The plain language of Business and Professions Code section 26050.2 affords
14 licensing agencies the “sole discretion” to issue, deny, or revoke provisional licenses. Therefore,
15 no property interest in a provisional license can be found.

16 **b. The California Constitution Does Not Establish any**
17 **Protected Beneficial Interest Held by Petitioners or Any**
18 **Right to a Pre-Deprivation Hearing**

19 Petitioners fail to establish that the significance of their private interests outweigh the
20 governmental interests implicated in the licensing system or that additional procedural safeguards
21 are appropriate in the circumstances. Article 1 Section 7 of the California Constitution requires
22 that Petitioners “identify a statutorily conferred benefit or interest of which [they have] been
23 deprived to trigger procedural due process under the California Constitution.” (*Gresher v.*
24 *Anderson* (2005) 127 Cal.App.4th 88, 106.) In assessing whether the deprivation of a statutory
25 conferred interest offends California’s Due Process Clause, courts employ a flexible standard
26 encompassing four factors: (1) the private interest in issue; (2) the risk of an erroneous
27 deprivation of such interest and the probable value, if any, of additional procedural safeguards;
28 (3) the dignitary interest in informing interested parties of the grounds of the action enabling them

1 to be heard by a responsible governmental official; and (4) the governmental interest, including
2 the function involved. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565; *People v. Ramirez* (1979)
3 25 Cal.3d 260, 269.)

4 First, the Legislature determined that a provisional license does not warrant a pre-
5 deprivation hearing and there is no private interest in issue. “In determining whether permits are
6 property, the Courts consider whether the permit or license is transferable, the extent to which the
7 government has the right to regulate the underlying activity, or to revoke suspend, or modify the
8 permit or license, and whether there has been a legislative or regulatory expression that the
9 issuance of the permit does not create a property right.” (*Bronco Wine Co v. Jolly* (2005) 129
10 Cal.App.4th 988, 1031.) Here: (1) a provisional license is not transferable (Bus. & Prof. Code, §
11 26055, subd. (a); Bus. & Prof. Code, § 26050.2, subd. (f); Cal. Code Regs., tit. 3, § 8202, sub. (c));
12 (2) CDFA has the right to regulate the underlying cannabis cultivation activity through sections
13 26000, et seq., and California Code of Regulations, Title 3, and the right to revoke or deny a
14 provisional license by operation of law or at the discretion of the licensing agency (Bus. & Prof.
15 Code, § 26050.2, subs. (c), (d), (e), (h) and (i)); and (3) there is a legislative expression that the
16 issuance of a provisional license does not create a property right as the provisional license statute
17 expressly states that a licensing agency has the right to revoke or deny a provisional license at the
18 discretion of the licensing agency, and includes a date in which provisional licenses are repealed
19 stating, “This section shall remain in effect only until January 1, 2022, and as of that date is
20 repealed.” (Bus. & Prof. Code, § 26050.2, (c), (d) and (i).) Provisional licenses are a unique
21 opportunity that is unusual in any licensure scheme and it is a conditional privilege that does not
22 create a property right. In looking at section 26050.2 and the intended role of provisional licenses
23 in the implementation of the statewide regulatory scheme, it is clear that the Legislature did not
24 intend to create a property interest through provisional licenses. As such, the private interest in
25 maintaining a provisional license is not a property right requiring a pre-deprivation hearing.

26 Second, the need for additional safeguards against erroneous deprivation are outweighed
27 by the significant governmental interest in protecting public health and safety. “[A] person is not
28 always entitled to a hearing before being deprived of a property interest.” (*American Liberty Bail*

1 *Bonds, Inc. v Garamendi* (2006) 141 Cal.App.4th 1044, 1058.) There is an important
2 governmental interest “demanding prompt action [and] justify[ing] postponing the opportunity to
3 be heard until after the initial deprivation.” (*FDIC v. Mallen* (1998) 486 U.S. 230, 240.) Further,
4 there has been no erroneous deprivation in this case, as CDFA found that there were violations of
5 regulations, and CDFA did not exceed the discretion and authority it was afforded under section
6 26050.2 to revoke and deny the provisional license.

7 Third, no dignitary interest of applicants with provisional licenses is offended for lack of
8 notice. “A statute must be sufficiently clear to give fair warning of the conduct it prohibits.”
9 (*Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1424.) The statute is not vague, “a
10 person of common intelligence [need not] guess as to its meaning [or] differ as to its
11 applications.” (*Schwitzer v. Westminster Investments Inc.* (2007) 157 Cal.App.4th 1195, 1206.)
12 The provisional license statute is explicit that there are no rights to a hearing or appeal for the
13 revocation, suspension or refusal to issue a provisional license and expressly prohibits the hearing
14 rights afforded under Business and Professions Code Division 1.5 and MAUCRSA. (Bus. &
15 Prof. Code, § 26050.2, subd. (h).) Petitioners, and all provisional license holders, were on notice
16 of the nature of the interest being conferred and of the potential consequences of failure to
17 comply with required conditions.

18 Fourth, the governmental interest is significant and outweighs the private interest in the
19 conditional privilege of applicants to operate prior to demonstrating eligibility for an annual
20 license. The fundamental purpose of licensing agencies and the rules they enforce is to safeguard
21 consumer safety, public health, protect the environment, and prevent diversion into the illegal
22 market. CDFA has exercised its discretion and authority in accordance with that purpose.

23 Depending on consideration of these four factors, a varying degree of due process
24 requirements may be appropriate: “In some instances this balancing may counsel formal hearing
25 procedures that include the rights of confrontation and cross-examination, as well as a limited
26 right to an attorney. In others, due process may require only that the administrative agency
27 comply with the statutory limitations on its authority.” (*People v. Ramirez, supra*, 25 Cal.3d at p.
28 269.) The privilege to operate under a provisional license falls on the latter end of the spectrum

1 of protections and CDFA did not exceed the discretion afforded to it by the Legislature in
2 revoking and denying Petitioners' provisional cultivation license. Requiring pre-deprivation
3 hearings would limit the ability of licensing agencies to carry out their statutory functions and
4 undermine the policy goals that the Legislature has sought to achieve. As such, it does not
5 warrant significant due process protections.

6 **c. Legislative Acts Are Presumed Valid**

7 Acts of the Legislature come before the Court "clothed with a presumption of
8 constitutionality [and] all presumptions and intendments favor the validity of a statute and mere
9 doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be
10 upheld unless their unconstitutionality clearly, positively and unmistakably appears." (*In re Ricky*
11 *H.* (1970) 2 Cal.3d. 513, 518 [internal quotations and citations omitted].) "To the extent there is
12 any question about the proper interpretation of the statute, it might well be resolved by reference
13 to the usual rule that a statute will be interpreted to avoid serious constitutional questions if such
14 an interpretation is fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 699.)

15 In designing the provisional licensure scheme, the Legislature allowed licensing agencies,
16 in their "sole discretion" to confer the privileges to annual license applicants so long as they could
17 demonstrate that compliance with applicable law was under way. (Bus. & Prof. Code § 26050.2
18 (a).) The statute on its face confers no entitlement, provides licensing agencies with the
19 discretion and authority they need to carry out their most fundamental function, and supports the
20 development of a robust regulated industry that eliminates the illegal market, creates legal jobs,
21 and generates tax revenue for the State. The Legislature acted deliberately when it afforded lesser
22 due process protections to applications with the conditional privilege of operating. This was done
23 to counterbalance the risks of issuing provisional licenses to applicants who have not been fully
24 vetted for eligibility for annual licenses. The governmental interest of safeguarding public health
25 and the environment is sufficient to warrant summary revocation and denial of the conditional
26 privilege granted pursuant to the discretion of the licensing agency in accordance with section
27 26050.2.

28

1 **3. Adequate (Administrative) Remedy at Law**

2 Petitioners are not entirely without an opportunity to be heard, and there are adequate
3 administrative remedies available should the circumstances warrant. If Petitioners' annual license
4 application is denied, Petitioners have the right to request an evidentiary hearing. (Bus. & Prof.
5 Code, § 26058.) If after an evidentiary hearing, Petitioners do not agree with the final decision,
6 they have the right to appeal the decision to the Cannabis Control Appeals Panel (Bus. & Prof.
7 Code § 26043), and the decisions of the Cannabis Control Appeals Panel may be reviewed by the
8 Supreme Court or the courts of appeal. (Bus. & Prof. Code, § 26045.) While the Legislature
9 found that no pre-deprivation right to a hearing is appropriate in cases involving provisional
10 licenses, the appeal of the denial of an annual license provides an opportunity to be heard to
11 satisfy the due process requirements of Article 1 § 7 of the California Constitution.

12 **IV. PETITIONERS SHOULD BE REQUIRED TO POST A BOND**

13 If the Court were to issue a preliminary injunction, it must require an undertaking or cash
14 deposit in lieu of an undertaking. (Code. Civ. Proc., §§ 529, 995.710.) The bond should be
15 sufficient to cover any injury to the public or damage caused by a wrongly issued injunction. (*Id.*,
16 § 529.) The potential harm is potentially significant, and a substantial bond, to secure the many
17 millions of dollars at risk, is warranted here.

18 **V. CONCLUSION**

19 Respondents respectfully request that the Court deny the Request for Preliminary
20 Injunction.

21 Dated: June 11, 2021

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Emerald Acres Corporation v. California Department of Food and Agriculture, et al.**

No.: **RG21098348**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter

On June 11, 2021, I served the attached:

OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION;

DECLARATION OF MISTY RHOADS FILED IN SUPPORT OF OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION; AND

DECLARATION OF DANA EAGLE FILED IN SUPPORT OF OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

by transmitting a true copy via electronic mail addressed as follows:

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Counsel for Petitioners

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 11, 2021, at San Diego, California.

Elsa Olguin
Declarant


Signature