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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 ACRE 41, an Arizona Limited Liability
11 Corporation; GREATER PHOENIX
URBAN LEAGUE, INC., a Non-Profit
12 Corporation,

13 Plaintiffs,

14 vs.

15 STATE OF ARIZONA, a governmental
16 entity; ARIZONA DEPARTMENT OF
HEALTH SERVICES, a political subdivision
17 of the State of Arizona; DOUG DUCEY, in his
official capacity as Governor of the State of
18 Arizona; DONALD HERRINGTON, in
his official capacity as Director of the
Arizona Department of Health Services;

19 Defendants.
20

No.

VERIFIED COMPLAINT

**(Declaratory Judgment; *Ultra Vires*
Regulations; Mandamus)**

21 **PARTIES, JURISDICTION AND VENUE**

22 1. This lawsuit arises from the publication of *ultra vires* final regulations by
23 the Arizona Department of Health Services on October 13, 2021, purporting to
24 implement the recreational marijuana “social equity” program approved by the voters in
25 2020 through the passage of Proposition 207 and subsequently mandated by enactment
26 of A.R.S. § 36-2854(A)(9).

1 2. In broad terms, the final regulations promulgated by ADHS fail in some
2 ways to fully implement the mandates of Proposition 207 and A.R.S. § 36-2854(A)(9)
3 (“the Social Equity Program”) and, in other ways, exceed the rulemaking authority
4 conferred on ADHS by the enabling statute.

5 3. Plaintiff Acre 41, LLC (“Acre 41”) is an Arizona limited liability company
6 with its principal place of business in Maricopa County, Arizona.

7 4. Plaintiff Greater Phoenix Urban League, Inc. (“the Urban League”) is a
8 non-profit corporation with its principal place of business in Maricopa County, Arizona.

9 5. Plaintiff Acre 41 is a consortium of Black female entrepreneurs with
10 significant expertise in the marijuana industry. Its owners and clients are directly
11 impacted by the *ultra vires* final “social equity” regulations promulgated by ADHS and
12 published October 13, 2021.

13 6. Plaintiff Urban League is a non-profit organization whose mission is to
14 support minority communities, including communities disproportionately impacted by
15 the enforcement of prior marijuana laws, in achieving economic and social equality in
16 part through economic empowerment and civic engagement. This mission is directly
17 impacted by the *ultra vires* final “social equity” regulations promulgated by ADHS and
18 published October 13, 2021.

19 7. Defendant State of Arizona is a sovereign state of the United States of
20 America.

21 8. Defendant Doug Ducey is the governor of the State of Arizona (named in
22 his official capacity only) and is believed to be a resident of Maricopa County, Arizona.

23 9. In his capacity as Governor, Defendant Ducey is vested with the supreme
24 executive power of the state and is responsible for the faithful execution of its laws,
25 including the Marijuana Legalization Initiative (“the Act”).

26 10. Defendant Arizona Department of Health Services (“ADHS”) is an
Arizona administrative agency with its principal place of business in Maricopa County,
Arizona. It is responsible for implementing and administering the AMMA.

1 11. Defendant Don Herrington is sued in his official capacity as Director of
2 ADHS and is believed to be a resident of Maricopa County, Arizona. As the Director of
3 ADHS, Defendant Herrington is responsible for implementing and administering the
4 AMMA. See A.R.S. §§36-2801 *et seq.*

5 12. Defendants State of Arizona, Ducey, ADHS, and Herrington are
6 hereinafter referred to collectively as “defendants” or “government defendants.”

7 13. Venue is proper in this court pursuant to Rule 4(b), *Arizona Rules of*
8 *Procedure for Special Actions.*

9 14. This Court has jurisdiction to hear this Special Action Complaint and to
10 grant the relief requested by authority of Art. VI, Sect. 18 of the Arizona Constitution,
11 Rules 1, 2 and 4 of the *Arizona Rules of Procedure for Special Actions*; and A.R.S. § 36-
12 2818.

13 15. This Complaint is a “statutory special action” under Rule 1(b) of the
14 *Arizona Rules of Procedure for Special Actions*. In a statutory special action, the claims
15 and questions presented are not limited by Rule 3 of those Rules; *accord Primary*
16 *Consultants, L.L.C. v. Maricopa Cnty. Recorder*, 210 Ariz. 393, 402, n.1, 111 P.3d 435,
17 444 (Ariz. App. Div. 1, 2005).

18 16. Plaintiffs have no other equally plain, speedy and adequate remedy, the
19 allegations in this Special Action Complaint demonstrate that the action raises questions
20 cognizable in a special action under Rules 1 and 3 of the *Arizona Rules of Procedure for*
21 *Special Actions* because these claims raise statutory and constitutional questions of
22 statewide importance; they need to be decided as quickly as possible.

23 **FACTS PERTINENT TO ALL CLAIMS**

24 17. Also known as the Smart and Safe Arizona Act, Proposition 207 was a
25 voter initiative that appeared on the November 3, 2020, Arizona general election ballot.
26 Passing with approximately 60% of the vote, the proposition allowed the legalization,
taxation, and recreational use of cannabis for adults 21 and over.

1 18. Among the requirements of Proposition 207 was the creation of the Social
2 Equity Program, which was defined as a “*program* to promote the *ownership and*
3 *operation* of *marijuana establishments* and marijuana testing facilities by individuals
4 from communities *disproportionately* impacted by the enforcement of previous
5 marijuana laws” (emphases supplied).

6 19. The statutory phrase “marijuana establishments” necessarily includes more
7 entities or businesses than just marijuana dispensaries, such as marijuana cultivation
8 facilities, infusion kitchens, and retail consulting operations.

9 20. Proposition 207 called for the ADHS to promulgate rules to “implement
10 and enforce” its various provisions.

11 21. Once passed by the voters, the provisions of Proposition 207 were codified
12 in Arizona Revised Statutes. The Social Equity Program was codified at A.R.S. § 36-
13 2854(A)(9). The ADHS mandate to implement and enforce the Social Equity Program
14 was codified at A.R.S. § 36-2854(A).

15 22. A.R.S. § 36-2854(A) tasks the ADHS with “the creation and
16 implementation of a social equity ownership program to promote the ownership *and*
17 *operation* of marijuana establishments and marijuana testing facilities by individuals
18 from communities *disproportionately* impacted by the enforcement of previous
19 marijuana laws” (emphases supplied).

20 23. A.R.S. § 36-2854(A)(1)(f) calls for the ADHS to issue twenty-six
21 additional marijuana establishment licenses to entities that are qualified pursuant to the
22 “social equity ownership program.”

23 24. On October 13, 2021, the ADHS published proposed final rules purporting
24 to implement the Social Equity Program mandated by Proposition 207 and A.R.S. § 36-
25 2854(A)(9) and to set qualifying criteria to be used in allocating the twenty-six
26 marijuana establishment licenses issued as part of the Social Equity Program.

 25. The proposed final rules would be codified in the Arizona Administrative
Code under Section R9-18-303 *et seq.*

1 26. The proposed final rules set an application period for licenses issued under
2 the Social Equity Program to begin December 1, 2021, and to end December 14, 2021,
3 and specify the information to be supplied and qualifications to be satisfied by
4 applicants.

5 27. The proposed final rules set forth the qualifying criteria for an applicant
6 under the Social Equity Program in R9-18-303(B)(1-4) (“Qualified Owner”).

7 28. R9-18-303(A)(4) provides that applicants must attest that the applicant’s
8 principal board members and officers have not, directly or indirectly, “entered or
9 promised to enter any agreements for a change in ‘ownership’ as defined in subsection
10 (E), that will cause the applicant to no longer qualify for a marijuana establishment
11 license under subsection (B).”

12 29. “Subsection (E),” or R9-18-303(E) defines “ownership” as an interest in
13 the applicant entity that:

- 14 a. Entitles the individual to at least a portion of the distributed profits
15 of the applying entity that is proportional to the percentage of the
16 individual’s interest in the applying entity;
- 17 b. Ensures that the individual has a percentage of the voting rights in
18 the applying entity that is proportional to the percentage of the
19 individual’s interest in the applying entity; and
- 20 c. Is not subject to restrictions or assignments of voting rights or other
21 arrangements that cause or may cause benefits derived from the
22 individual’s interest in the applying entity to go to another
23 individual due to any circumstances *other than the voluntary sale*
24 *of the interest* or the individual’s death or incapacity.

25 30. R9-18-303(A)(7) requires the applicant submit attestations confirming that
26 any principal officer or board member who satisfies the criteria set forth in R9-18-
303(B)(1-2) for a Qualified Owner cannot be removed from their position as principal
officer or board member without their written consent or a court’s order for removal.

1 31. R9-18-303(B)(4) precludes the principal officers and board members of an
2 applicant from entering any pre-arranged, tentative, or final agreement to sell or
3 otherwise limit the ownership or interest of any Qualified Owner.

4 32. R9-18-303(B)(2) requires that 51% of the total ownership interests in an
5 applicant entity be held by a Qualified Owner or Qualified Owners that satisfy at least
6 **three of four** criteria specified in R9-303(B)(3).

7 33. The four criteria for individual eligibility under Social Equity Program
8 specified in R9-18-303(B)(3) are:

- 9 a. An annual household income less than 400% of the “poverty level”
10 for three of the five years from 2016 through 2020;
- 11 b. Has been convicted of a criminal offense related to marijuana or
12 marijuana paraphernalia or has had a qualifying marijuana-related
13 conviction expunged under A.R.S. § 36-2862;
- 14 c. Is the spouse, sibling, parent, or legal guardian of an individual who
15 has been convicted of a marijuana or marijuana paraphernalia-
16 related criminal offense;
- 17 d. Has lived in a “disproportionately impacted” zip code, as separately
18 identified by the ADHS, for three of the five years from 2016
19 through 2020.

20 34. R9-18-303(A)(5) requires an applicant to attest that its principal officers
21 and board members do not “have” an excludable felony offense as defined in A.R.S. §
22 36-2801(7).

23 35. Under A.R.S. § 36-2801(7)(b)(i), excludable felony offenses include
24 “violation of a state or federal controlled substance law that was classified as a felony”
25 but does not include such convictions if the sentence, including any resulting term of
26 probation, was completed more than ten (10) years ago.

 36. As a result, the final rules promulgated by the ADHS prohibit Qualified
Owners with a prior felony marijuana conviction for which they completed their

1 sentence within the last 10 years from applying for a license, despite that prior
2 conviction being material to their eligibility as a Qualified Owner.

3 37. In operation R9-18-303(A)(5) would prohibit any applicant under the age
4 of 28 with a prior cannabis conviction from serving as a principal officer or board
5 member of a dispensary notwithstanding whether they satisfy the eligibility requirements
6 for a Qualified Owner.

7 38. The final rules promulgated by the ADHS **do not** require that a marijuana
8 establishment license issued under the Social Equity Program must continue to satisfy
9 the 51% ownership requirement of R9-18-303(B)(2) after the license has been issued by
10 the ADHS.

11 39. As a result of the failure to establish a program of oversight and the failure
12 to require that Social Equity Program licenses remain owned by Social Equity eligible
13 individuals, the final rules promulgated by ADHS create what are functionally 26
14 “lottery tickets” for qualifying individuals rather than a regime of continuing social
15 equity ownership and operation.

16 40. The final rules promulgated by the ADHS **do not** establish any social
17 equity ownership or operational requirements for entities providing regulated marijuana
18 related services under the authority of the social equity license, such as (without
19 limitation) cultivators, kitchen operators, and retail management companies.

20 41. The final rules promulgated by the ADHS **do not** include any mechanism
21 or requirements that prohibit the sale or transfer of the Qualified Owner’s interest to
22 another individual who is not a Qualified Owner.

23 42. The final rules promulgated by the ADHS **do not** establish any
24 requirements or criteria for the *operation* of marijuana establishments licensed under the
25 Social Equity Program by individuals from communities disproportionately impacted by
26 the enforcement of previous marijuana laws.

43. The final rules promulgated by the ADHS **do not** require that the licensed
establishments be located or operated in the geographic areas the ADHS has identified as

1 being disproportionately impacted by the enforcement of previous marijuana laws.

2 44. The final rules promulgated by the ADHS **do not** permit individuals who
3 have earned less than 400% of the poverty level, and have a qualifying relation with a
4 marijuana conviction, to apply for a social equity license as a Qualified Owner if they
5 have lived outside of a disproportionately impacted zip code for the last 25 months, even
6 if that individual lived in a disproportionately impacted zip code their entire childhood.

7 45. The final rules promulgated by the ADHS **do not** provide any mechanism
8 to ensure that Social Equity Program licenses revoked by ADHS will be reallocated
9 using the Social Equity Program criteria. As a result, the final rules promulgated ADHS
10 fail to ensure the creation of a *program* to oversee the existence of 26 Social Equity
11 Program licenses in perpetuity.

12 46. The final rules promulgated by the ADHS **do not** establish any process or
13 criteria for the reallocation of Social Equity Program licenses in the event the ADHS
14 revokes any of the original 26 Social Equity Program licenses once they are initially
15 allocated by the ADHS. As a result, the final rules promulgated by the ADHS fail to
16 ensure the creation of a *program* to ensure the existence of 26 Social Equity Program
17 licenses in perpetuity.

18 **COUNT I**

19 **(Mandamus)**

20 47. Plaintiffs incorporate all previous allegations of this Special Action
21 Complaint as if restated fully below.

22 48. As Governor, Defendant Ducey heads the executive branch of state
23 government.

24 49. The ADHS is an executive branch administrative agency, and its director,
25 Defendant Herrington, is appointed by Defendant Ducey.

26 50. Under Article V, Section 4 of the Arizona Constitution, Defendants Ducey
and Herrington have a duty to ensure the laws of Arizona are faithfully executed.

1 51. By authority of the Arizona Constitution, the power of the people to
2 legislate by ballot initiative is as great or greater than the power of the legislature.

3 52. The Arizona Constitution requires the Governor and his appointees to
4 faithfully execute the laws enacted by the people through ballot initiative.

5 53. In November 2020, Arizona voters passed Proposition 207, which called
6 for the Governor and the ADHS to create and implement a *program* to promote the
7 *ownership and operation* of 26 marijuana dispensaries by individuals from communities
8 disproportionately impacted by the enforcement of previous marijuana laws.

9 54. The Governor, by and through the ADHS, is obligated to implement the
10 will of the voters as expressed in Proposition 207 and enacted into law as A.R.S. § 36-
11 2854(A)(9).

12 55. A.R.S. § 36-2854(A) directs the ADHS to adopt rules to implement and
13 enforce the requirements of A.R.S. § 36-2854 and other statutes in that chapter.

14 56. The ADHS promulgated final regulations purporting to implement and
15 provide for the enforcement of the Social Equity Program on October 13, 2021.

16 57. The final rules promulgated by the ADHS on October 13, 2021, fail in
17 multiple ways to implement the requirements of Proposition 207 / A.R.S. § 36-
18 2854(A)(9).

19 58. Specifically, although the final rules promulgated by the ADHS establish
20 certain requirements related to *ownership* of marijuana establishments, they **do not**
21 establish any requirements or criteria for the *operation* of marijuana establishments
22 licensed under the Social Equity Program by individuals from communities
23 disproportionately impacted by the enforcement of previous marijuana laws.

24 59. The final rules promulgated by the ADHS fail to ensure the operation and
25 ownership of establishments licensed under the Social Equity Program after the initial
26 license allocation because one the Social Equity eligible owners receive the financial
benefits of owning marijuana businesses, they will surely earn more than 400% of the
federal poverty level and are likely to move out of disproportionately impacted zip

1 codes. As a result, within a period of years, the final rules permit a regime of Social
2 Equity license ownership that no longer comports with the original eligibility criteria
3 used to allocate the licenses.

4 60. The final rules promulgated by the ADHS fail to establish criteria or
5 procedures for the existence and administration of a *program* to promote the continued
6 ownership and operation of marijuana establishments by individuals from communities
7 disproportionately impacted by the enforcement of previous marijuana laws after the
8 initial allocation and issuance of licenses by the ADHS.

9 61. The final rules promulgated by the ADHS fail to establish criteria or
10 procedures to ensure the ownership and operation of non-dispensary marijuana
11 establishments, such as (without limitation) cultivators, kitchen operators, or retail
12 management companies.

13 62. The final rules promulgated by the ADHS fail to establish any requirement
14 to ensure marijuana establishments licensed under the Social Equity Program are located
15 in zip codes disproportionately impacted by the enforcement of previous marijuana laws.

16 63. The final rules promulgated by the ADHS fail to provide any mechanism
17 or process to ensure that marijuana establishments licensed under the Social Equity
18 Program remain owned by individuals from communities disproportionately impacted by
19 the enforcement of previous marijuana laws after the licenses are initially allocated by
20 the ADHS.

21 64. The final rules promulgated by the ADHS permit owners who qualify
22 under the Social Equity Program to enter an agreement to sell or transfer their ownership
23 interest in the licensed entity at any point after the license is allocated, which defeats the
24 purpose of the Social Equity Program.

25 65. The failure to fully implement the requirements of A.R.S. § 36-2854(A)(9)
26 violate the duties of Defendants Ducey and Herrington to faithfully execute the law. *See,*
e.g., Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (Ariz. 1992).

66. The proper remedy or vehicle for a mandamus action is a statutory special

1 action for which this Court’s jurisdiction is mandatory and not discretionary under Rule
2 1(b) of the Arizona Rules of Procedure for Special Actions.

3 67. Although such a showing is not required for a statutory special action,
4 Plaintiffs have no equally plain, speedy, or adequate remedy to compel Defendants’
5 compliance with A.R.S. § 36-2854(A), *et seq.*

6 68. There are no administrative remedies Plaintiffs must exhaust as a
7 prerequisite to bringing this mandamus action.

8 COUNT II

9 *(Ultra Vires Administrative Action)*

10 69. Plaintiffs incorporate all previous allegations of this Special Action
11 Complaint as if fully restated below.

12 70. Administrative regulations that exceed their enabling legislation are *ultra*
13 *vires* and invalid.

14 71. An administrative agency may not modify a statute nor act contrary to it,
15 but must implement its enabling legislation as drafted. *See, e.g., Swift & Co. v. State Tax*
16 *Comm’n.*, 105 Ariz. 226, 230, 462 P.2d 775, 779 (Ariz. 1969) (reversed on other
17 grounds) (“it is fundamental ... that an administrative agency or commission must
18 exercise its rule-making authority within the grant of legislative power as expressed in
19 the enabling statutes. Any excursion beyond the legislative guidelines is treated an
20 usurpation of constitutional powers”).

21 72. The proposed final rules promulgated by the ADHS are in various respects
22 *ultra vires* inasmuch as they exceed the enabling legislation (A.R.S. § 36-2854).

23 73. The proposed final rules promulgated by the ADHS are *ultra vires*
24 inasmuch as they fail to fully implement the requirements of the enabling legislation or
25 do so inconsistent with the legislative text.

26 74. The final rules promulgated by the ADHS **do not** permit individuals who
have earned less than 400% of the poverty level, and have a qualifying relation with a

1 marijuana conviction, to apply for a social equity license as a Qualified Owner if they
2 have lived outside of a disproportionately impacted zip code for the last 25 months, even
3 if that individual lived in a disproportionately impacted zip code their entire childhood.
4 Consequently, the regulations exceed the statutory mandate by excluding from the social
5 equity program certain individuals who have been disproportionately impacted by the
6 enforcement of previous marijuana laws as such impact is defined by the ADHS.

7 75. The final rules promulgated by the ADHS **do not** permit individuals with
8 an otherwise qualifying felony marijuana-related criminal conviction in the last 10 years
9 to serve as principal officers or board members of an establishment licensed under the
10 Social Equity Program, despite those individuals being members of a community
11 disproportionately impacted by the enforcement of previous marijuana laws.

12 76. The final rules promulgated by the ADHS contravene the intention and
13 express purpose of their enabling legislation by permitting marijuana establishments
14 licensed under the Social Equity Program to be sited/located outside of the zip codes
15 identified by the ADHS as disproportionately impacted by the enforcement of previous
16 marijuana laws.

17 77. The final rules promulgated by the ADHS contravene the intention and
18 express purpose of their enabling legislation by permitting Qualified Owners to sell or
19 transfer their interests, without restriction, to individuals or entities who would not
20 satisfy the eligibility requirements of a Qualified Owner after the license has been
21 initially allocated by the ADHS.

22 78. The final rules promulgated by the ADHS permit licenses allocated under
23 the Social Equity Program to be owned by individuals who do not meet the Social
24 Equity eligibility criteria as a result of inheritance or transfer upon death after the
25 licenses are initially allocated.

26 79. The final rules promulgated by the ADHS contravene the intention and
express purpose of their enabling legislation by failing to establish application review
procedures that will allow the ADHS to ensure that the applicants to be awarded licenses

1 under the Social Equity Program actually satisfy all the stated eligibility criteria prior to
2 allocating licenses.

3 **COUNT III**

4 **(Declaratory Judgment)**

5 80. Plaintiffs incorporate all previous allegations of this Special Action
6 Complaint as if fully restated below.

7 81. A.R.S. § 12-1832 authorizes any person whose rights, status, or legal
8 relations are affected by a statute (or regulation) to have determined any question of
9 construction or validity arising thereunder and to obtain a declaration of rights, status, or
10 legal relations thereunder.

11 82. A dispute exists as between Plaintiffs and Defendants regarding the
12 legality and constitutionality of the proposed final regulations promulgated by the ADHS
13 to implement the marijuana Social Equity Program.

14 83. Plaintiffs request this Court declare the legality of these actions and the
15 constitutionality of the regulations described herein.

16 84. Plaintiffs further request supplemental relief, pursuant to A.R.S. § 12-
17 1838, and request the Court enjoin the ADHS from implementing its proposed
18 regulations or allocating Social Equity Program licenses until the Court resolves the
19 claims asserted in this action.

20 WHEREFORE, Plaintiff requests that judgment be entered against Defendants
21 and pray for relief as follows:

- 22 a. For an order declaring the final rules promulgated by the ADHS on
23 October 13, 2021, *ultra vires* and invalid as plead herein;
- 24 b. For an order mandating the ADHS promulgated new proposed rules
25 that effectuate the purpose of the enabling legislation without
26 exceeding its limitations;
- 27 c. For an order declaring and mandating that the ADHS must

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promulgate rules to ensure the continued oversight of a program to ensure the operation and ownership of 26 marijuana dispensary licenses by individuals from communities disproportionately impacted by previous marijuana laws;

- d. For an order enjoining or restraining the ADHS from implementing the proposed final rules promulgated on October 13, 2021, until the conclusion of this litigation;
- e. For an order enjoining or restraining from accepting applications or allocating licenses under the Social Equity Program until the conclusion of this litigation;
- f. For an award of attorney fees under the private attorney general doctrine or any other applicable authority or theory;
- g. For an award of taxable costs;
- h. For such other relief as may be just and proper.

DATED this 18th day of November, 2021.

**FRAZER, RYAN, GOLDBERG &
ARNOLD, L.L.P.**

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