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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF FRESNO  
14

15 CATALYST – FRESNO LLC,

16 Petitioner/Plaintiff,

17 v.

18 CITY OF FRESNO; and DOES 1-50,  
19 inclusive,

20 Respondents/Defendants.

21 1261 WISHON OPCO, LLC, a California  
limited liability company; TAT FRESNO LLC,  
22 a California limited liability company;  
AUTHENTIC 559, LLC, a California limited  
23 liability company; CRESCENT CONQUEST  
LLC, a California limited liability company;  
24 and DOES 51-100, inclusive,

25 Real Parties in Interest.  
26  
27  
28

Case No. **21CECG03543**

**REAL PARTY IN INTEREST AUTHENTIC  
559, LLC'S NOTICE OF DEMURRER AND  
DEMURRER TO THE SECOND AMENDED  
VERIFIED PETITION FOR WRIT OF  
MANDAMUS AND COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

***[Request for Judicial Notice; Declaration of  
Nicole Phillis; and Proposed Order filed  
concurrently]***

Assigned to the Hon. Stephanie Negin  
Dept.: 402

Date: September 7, 2022  
Time: 1:30 p.m.

Action Filed: November 30, 2021

1 **NOTICE OF DEMURRER**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE on September 7, 2022, at 1:30 p.m., in Department 402 of the  
4 above-captioned Court, located at the B.F. Sisk Courthouse, 1130 O Street, Fresno, California,  
5 93721, Real Party in Interest Authentic 559, LLC (“Authentic”) will and hereby does move the  
6 Court for an order sustaining the demurrer to the First and Second causes of action of the Second  
7 Amended Verified Petition for Writ of Mandamus (the “Second Amended Petition” or “SAP”)  
8 filed by Petitioner/Plaintiff Catalyst – Fresno LLC (“Petitioner”).

9 This demurrer is made pursuant to Code of Civil Procedure, section 430.10, subdivisions  
10 (a) and (e), on the bases that: Petitioner’s claim is premature and not ripe, as the decision(s) it  
11 seeks to challenge as to Authentic and Real Party in Interest 1261 Wishon Opco, LLC  
12 (“Wishon”)are not yet final, as the Court previously held when granting Authentic’s demurrer to  
13 the First Amended Verified Petition; and in any event, Petitioner has not and cannot allege the  
14 elements of its claim as to the denial of Petitioner’s application because the City of Fresno has no  
15 ministerial duty to issue Petitioner *any* permit, nor has Petitioner pleaded any, because the FMC  
16 expressly states that (1) “*Applicants shall have no right to a commercial cannabis business*  
17 *permit*. Each applicant assumes the risk that, at any time prior to the issuance of a permit, the  
18 City Manager may terminate or delay the program...” (FMC § 9-3317, subd. (f) [emphasis  
19 added]), and (2) the City Manager “has *discretion to limit the number of permits to less than [the*  
20 *2 permits] allowed.*” (FMC §§3306, subd. (e), (f); 9-3317, subd. (f) [emphasis added].)  
21 Petitioner’s Second Amended Petition therefore fails to state a claim for which relief can be  
22 granted under settled principles of California law.


23 This demurrer is based on this notice; the demurrer; the included memorandum of points  
24 and authorities; the concurrently filed declaration of Nicole S. Phillis; the concurrently filed  
25 Request for Judicial Notice and exhibits thereto; all matters of which the court may take judicial  
26 notice; all pleadings, records and files in this action; and such evidence and argument as may be  
27 presented at or before the hearing on this demurrer.

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As required by Code of Civil Procedure, section 430.41, and as described in the concurrently filed declaration of Nicole S. Phillis, counsel for the parties met and conferred, but they were unable to come to agreement regarding the demurrer or withdrawal of the Second Amended Petition. (Declaration of Nicole S. Phillis, [“Phillis Decl.”] ¶¶ 1–2 & Exs. A–D.)

DATED: August 5, 2022

DAVIS WRIGHT TREMAINE LLP  
NICOLE S. PHILLIS  
HEATHER F. CANNER  
JOHN A. GOLDMARK

By:   
Nicole S. Phillis  
Attorneys for Real Party In Interest  
AUTHENTIC 559, LLC

1 **DEMURRER TO THE FIRST CAUSE OF ACTION**


2 Authentic 559, LLC (“Authentic”) demurs generally and specially to Petitioner/Plaintiff  
3 Catalyst – Fresno LLC’s (“Petitioner”) first cause of action for Petition for Peremptory Writ of  
4 Mandate on the ground that Petitioner’s claim is not yet ripe and there is no final decision subject  
5 to judicial review at this time as to Real Parties in Interest Authentic 559, LLC (“Authentic”) and  
6 1261 Wishon Opco, LLC (“Wishon”).

7 In addition, Petitioner has not and cannot allege the requisite facts to state a claim as to the  
8 denial of Petitioner’s application because the City of Fresno has no ministerial duty—nor has  
9 Petitioner identified any ministerial duty—to issue Petitioner a permit, regardless of the outcomes  
10 of the final decisions on the applications of Authentic and Wishon. Fresno Municipal Code  
11 expressly provides the *opposite*, namely that (1) “*Applicants shall have no right to a commercial*  
12 *cannabis business permit*. Each applicant assumes the risk that, at any time prior to the issuance  
13 of a permit, the City Manager may terminate or delay the program...” (FMC § 9-3317, subd. (f)  
14 [emphasis added]), and (2) the City Manager “has *discretion to limit the number of permits to*  
15 *less than [the 2 permits] allowed*.” (FMC §§3306, subd. (e), (f); 9-3317, subd. (f) [emphasis  
16 added].)

17 Because Petitioner cannot as a matter of law allege a ministerial duty owed by the City of  
18 Fresno to Petitioner to either grant or reinstate Petitioner’s application, Petitioner fails to allege  
19 facts sufficient to state a cause of action. (Code Civ. Proc. § 430.10, subd. (a), (e).)

20  
21 DATED: August 5, 2022

DAVIS WRIGHT TREMAINE LLP  
NICOLE S. PHILLIS  
HEATHER F. CANNER  
JOHN A. GOLDMARK

22  
23  
24 By:   
25 \_\_\_\_\_  
Nicole S. Phillis

26 Attorneys for Real Party In Interest  
27 AUTHENTIC 559, LLC  
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I. INTRODUCTION

Petitioner Catalyst-Fresno, LLC’s Second Amended Petition (“SAP”)—filed a mere week after this Court’s prior order sustaining Authentic’s demurrer—improperly seeks reconsideration of this Court’s prior ruling sustaining Authentic’s demurrer to the First Amended Petition (“FAP”) on ripeness grounds without a sufficient factual basis to do so. Specifically on May 25, 2022, this Court dismissed Petitioner’s FAP seeking to challenge the preliminary approval of two commercial cannabis business permits for Real Parties in Interest Authentic 559, LLC (“Authentic”) and 1261 Wishon Opco, LLC (“Wishon”) and on the grounds that “the City Manager has not issued a final decision,” because, among other things, “a successful applicant must complete nine additional steps before final approval.” (Phillis Decl. & RJN Ex. L at 3-6; FMC §§ 9-3305, 9-3317(d) & (h), 9-3329.) Thus the Court held that “there does not exist a ‘ripe controversy’ because the decision by the Respondent is only preliminary.” (Ibid.)

The SAP attempts to allege that this action is now ripe for review because the City of Fresno denied Petitioner’s application on May 31, 2022. (SAP ¶¶ 7, 11, 27, 43, 44, 53.) But the City’s decision as to Petitioner does not mean that the City has completed its rendered a final decision as to either Authentic or Wishon—the “preliminary approvals” Petitioner seeks to challenge and the decisions this Court already found were not ripe for review. Contrary to Petitioner’s pleadings, the City’s May 31, 2022, which is incorporated by reference in the pleadings but curiously omitted from the SAP, makes clear that no final decision has been made as to the preliminary approvals for either Authentic or Wishon and that their process remains “ongoing.” (RJN Ex. E.) In the absence of a final decision on the preliminary approvals of either Authentic or Wishon, Petitioner’s claim challenging their “preliminary approvals” remains unripe.

Beyond to the lack of finality and ripeness of Authentic and Wishon’s preliminary approvals, the SAP fails as a matter of law Petitioner cannot allege that the City had a clear, present ministerial duty to either grant or reinstate its application, as expressly sought. (SAP ¶ 52.) The SAP rests on the erroneous premise that if Wishon and Authentic’s applications had been denied, then Catalyst automatically would have a right to a license. (SAP ¶¶ 44, 52.) But the Fresno Municipal Code provides the opposite, namely that (1) “Applicants shall have no right



1 **to a commercial cannabis business permit.** Each applicant assumes the risk that, at any time  
2 prior to the issuance of a permit, the City Manager may terminate or delay the program...” (FMC  
3 § 9-3317, subd. (f) [emphasis added]), and (2) the City Manager “has **discretion to limit the**  
4 **number of permits to less than [the 2 permits] allowed.”** (FMC §§3306, subd. (e), (f); 9-3317,  
5 subd. (f) [emphasis added].)

6 Because the SAP fails to cure the fundamental lack of finality of Authentic’s “preliminary  
7 approval,” Petitioner’s challenge to Authentic preliminary approval should be sustained again on  
8 the same grounds as set forth in Judge Brickey’s May 25, 2022, ruling. Further, because, as a  
9 matter of law Petitioner cannot allege any ministerial duty owed by the City of Fresno to issue  
10 Petitioner a cannabis permit at all, regardless of whether it ultimately issues Authentic a permit,  
11 this Court should sustain the demurrer to the SAP without leave to amend.

## 12 II. FACTUAL BACKGROUND

### 13 A. The City of Fresno Designs a Multi-Phase Cannabis Permitting Program.

14 In 2018, the Fresno City Council adopted the Cannabis Retail Business and Commercial  
15 Cannabis Business Ordinance, which sets forth a process by which the City would issue  
16 commercial cannabis business permits. The City’s cannabis application procedures and  
17 requirements were codified in Chapter 9, Article 33 of the Municipal Code and Charter of the City  
18 of Fresno (the “Fresno Municipal Code” or “FMC”). (See Second Amended Verified Petition  
19 [“SAP”], ¶ 1 & Ex. A [Fresno Municipal Code].)

20 Pursuant to the FMC, the City Manager developed the application procedures and  
21 guidelines for commercial cannabis business permits, including, as relevant here, commercial  
22 cannabis retail business permits. (E.g., FMC §§ 9-3316(a) [“The City Manager ... shall be  
23 authorized to ... adopt any necessary rules to the application, regulations and processes[.]”]; *id.*  
24 § 9-3317(a) [“The City Manager shall adopt a procedure guideline and Review Criteria ....”]; *id.*  
25 § 9-3330(a) [“[T]he City Manager ... is authorized to establish any additional rules, regulations  
26 and standards governing the issuance, denial or renewal of commercial cannabis business  
27 permits[.]”].) The FMC also specified that it would initially allow two commercial retail cannabis  
28 permits for each of the City’s seven districts, but that an additional permit could be permitted per

1 district with council resolution (subject to certain other limitations). (FMC § 9-3306(b).)

2 The City Manager published the Application Procedures & Guidelines for a Commercial  
3 Cannabis Permit on October 19, 2020 (the “Guidelines”). (SAP, ¶ 1 & Ex. B [Guidelines].) The  
4 Guidelines explained that applications would be evaluated in four phases, including review of the  
5 applications for completeness in Phase I, scoring of the application based on criteria in the  
6 Guidelines in Phase II, and interviews in Phase III. (*Id.* ¶ 13–14 & Ex. B at 4–5.) In Phase IV,  
7 the City Manager would select the top applicants from each district to receive “preliminary  
8 approval” of their application, after which the applicant would be required to satisfy additional  
9 criteria before a license could be issued. (*Id.* ¶ 17 & Ex. B at 5.)

10 Approval was “preliminary” because the applicants were required to meet several other  
11 requirements as a condition of issuance of final approval and a CCB permit, including: (1) file  
12 pre-application with the Development Review Committee; (2) obtain an approved conditional use  
13 permit (“CUP”); (3) obtain a Business Tax License Certificate; (4) obtain a State of California  
14 Cannabis Business License; (5) supply proof of insurance; (6) supply information and fee for  
15 background checks and pass background checks; (7) obtain approval of a tenant improvement  
16 plan; (8) pass a facility inspection; and (9) pay the cannabis permit fee. (*Id.*, Ex. M at 3–6; FMC  
17 §§ 9-3305, 9-3317(d) & (h), 9-3329; *see also* Phillis Decl. & RJN Ex. L [Order Sustaining  
18 Demurrer to FAP] at 1; *id.*, Ex. H [***Final approval of the CCB Permit is contingent upon***  
19 ***approval of the following requirements***, along with all applicable requirements set forth in the  
20 Fresno Municipal Code”] [emphasis added]; SAP, ¶ 17.) Similarly, the FMC provides that the  
21 City Manager will not “formally issue” the final approvals to the “prevailing candidate(s)” until  
22 the relevant departments “affirm[]” that the applicant has “all of the required land use approvals”  
23 and a Cannabis Business License Tax certificate. (FMC § 9-3317(d).)<sup>1</sup>

24 **B. The FMC Vests the City and City Manager with Broad Discretion To Deny Any or**  
25

26 \_\_\_\_\_  
27 <sup>1</sup> The FMC and Guidelines also provide that any decision by the City Manager, including  
28 preliminary approval, may be appealed by “the applicant, the Mayor, or the Councilmember  
whose district the business would be located in.” (FMC § 9-3317(c); SAP, ¶ 18 & Ex. B at 6.)  
Such appeal may be made until 15 days after the “decision to issue a commercial cannabis  
business permit.” (FMC § 9-3317(c).)

1           **All Applications and Alter or Cancel the Cannabis Licensing Program at Any Time.**

2           In the FMC, the City reserved broad discretion to “modify, postpone, or cancel” the  
3 permitting program “at any time” prior to permit issuance. (*Id.* § 9-3316(k).) The City also  
4 “reserves the right to reject any and/or all applications, with or without cause or reason.” (*Id.* § 9-  
5 3316(k); SAP, Ex. B at 2.) The FMC provides that the City Manager has no ministerial duty to  
6 affirmatively issue any licenses: “Nothing in this Article creates a mandate that the City Manager  
7 must issue any or all of the commercial cannabis business permits.” (*Id.* § 9-3306(f).)

8           As a corollary to these reservations of discretion, the FMC states in various provisions that  
9 cannabis license applicants have no right to or expectation in a license: “Each applicant assumes  
10 the risk that, at any time prior to the issuance of a permit, the City Manager may terminate or  
11 delay the program.” (*Id.* § 9-3317(f); SAP Ex. B at 2). Indeed, the FMC further provides that  
12 “[p]ersons submitting applications assume the risk that all or any part of the program, or any  
13 particular category of permit potentially authorized under this Article, may be cancelled at any  
14 time prior to permit issuance” and that “the City may [] modify, postpone, or cancel ... the entire  
15 program under this Article, at any time without liability, obligation, or commitment to any party,  
16 firm, or organization.” (FMC § 9-3316(k).)

17           **C. The Application Process for District 1 Proceeds to Phase IV, Which Remains**  
18           **Ongoing Until the City Renders a Final Decision Formally Issuing the Permits.**

19           Petitioner and Real Parties in Interest successfully proceeded through Phases I, II, and III.  
20 (See SAP, ¶ 19.) After scoring in Phase III, the top-scored applicants were Real Parties in Interest  
21 TAT Fresno LLC (identified as “The Artist Tree” in City documents) (“TAT”) and 1261 Wishon  
22 OPCO LLC (“Wishon”). (See *id.*; RJN Ex F [City’s Final Scores].)<sup>2</sup> As for the remaining  
23 applicants, Authentic placed third, Petitioner placed fourth, and Real Party in Interest Crescent  
24 Conquest LLC placed fifth. (*Id.*)

25           On or around August 31, 2021, the City Manager selected TAT and Wishon for  
26

27 \_\_\_\_\_  
28 <sup>2</sup> Petitioner’s SAP omits several exhibits that were attached to its prior verified pleadings. Authentic submits some of these documents through its RJN, as those documents are a part of the record and City documents.

1 preliminary approval. (SAP, ¶ 20.) The City sent out letters to the other applicants, notifying  
2 them that two candidates had been selected for preliminary approval, and their application had not  
3 been selected. (RJN Ex. G [City’s Letter to Petitioner].) The letters advised, however, that

4           Your application will remain open and you may be contacted in the  
5           event a permit awardee fails to meet the conditions that must be  
6           satisfied in order to obtain official issuance of a CCB permit. ... A  
7           notice regarding a final decision on your application will be  
8           provided when the City Manager officially issues the CCB Permits  
9           pursuant to FMC Section 9-3317(d), for this application process.

10 (*Id.*) TAT and Wishon were still required to satisfy several conditions before they could be  
11 issued permits. And the City and City Manager retained discretion to deny the applications at any  
12 time. (*E.g.*, FMC §§ 9-3316(k), 9-3317(f).) In addition, their preliminary approval was subject to  
13 appeal. (*Id.* § 9-3317(c); SAP, Ex. B at 6.) In fact, the City Council member for District 1 did  
14 appeal both TAT and Wishon’s preliminary approvals, and on October 28, 2021, TAT’s  
15 preliminary approval was reversed. (SAP, ¶ 20.)

16           On November 30, 2021—***before Authentic had even obtained preliminary approval and***  
17 ***in an apparent and improper effort to influence the administrative process through judicial***  
18 ***mandamus proceedings***—Petitioner filed this lawsuit seeking an order from this Court revoking  
19 any preliminary approvals and ordering the City to issue Petitioner a permit. (First Amended  
20 Verified Petition [“FAP”], ¶¶ 35, 38, 41.) On December 17, 2021, the City Manager selected  
21 Authentic for preliminary approval. (RJN Ex. H [Preliminary Approval Letter].) On December  
22 29, the City Council member for District 1 appealed Authentic’s preliminary approval, which was  
23 affirmed on February 16, 2022. (RJN Ex. I [Council Member Appeal Letter]; RJN Ex. J [City’s  
24 Letter re Notice of Appeal]; SAP, ¶ 20.)

25           To this day, Authentic only holds a preliminary approval in the City of Fresno. Like the  
26 other prevailing candidate, Wishon, Authentic still must satisfy various conditions before the City  
27 Manager will issue a final decision. (*E.g.*, RJN Ex. E, K.) Until and unless Wishon and  
28 Authentic satisfy the requisite conditions, the City Manager cannot and will not render a “final  
decision” issuing the commercial cannabis retail permits. (RJN Ex. K; FMC § 9-3317(d).)

1 **D. The Court Sustains Authentic’s Demurrer as to the FAP on the Ground that the City**  
2 **Has Not Yet Issued a Final Decision and the Action Is Premature.**

3 On May 25, 2022, the Court held a hearing in this action on Authentic’s demurrer to the  
4 FAP, in which Authentic demurred on the grounds that the City Manager had not yet issued a  
5 final decision. (Demurrer, filed March 4, 2022.) Authentic explained that the City’s permitting  
6 process was ongoing and incomplete, that Authentic and Wishon had only been issued  
7 preliminary approval and were still required to satisfy several conditions before the City Manager  
8 would potentially issue a final decision formally awarding a cannabis business permit. (*Id.*)

9 After the hearing, the Court sustained the demurrer, explaining that the City had not yet  
10 issued its final decision and the action was therefore not ripe for judicial review:

11 **In this action, the City Manager has not issued a final decision.**  
12 **Following the preliminary approval, a successful applicant must**  
13 **complete nine additional steps before final approval.** (Authentic  
14 Ex. B at 3-6; FMC §§ 9-3305, 9-3317(d) & (h), 9-3329). Further,  
15 an appeal is provided 15 days after the final approval is made.  
16 (FMC § 9-3317(c).) ““In the context of administrative proceedings,  
17 a controversy is not ripe for adjudication until the administrative  
18 process is completed and the agency makes a final decision that  
19 results in a direct and immediate impact on the parties.”  
20 (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253,  
21 274-275 [internal citation omitted].) **In the instant action, there**  
22 **does not exist a “ripe controversy” because the decision by the**  
23 **Respondent is only preliminary.** (*Pacific Legal Foundation v.*  
24 *California Coastal Corn.* (1982) 33 Cal.3d 158, 169.)

25 (May 25, 2022, Order [the “May 25 Order”] at 1–2 [bold underline added].)

26 **E. Petitioner Files the SAP Even Though The City Still Has Not Made a Final Decision**  
27 **on Authentic and Wishon’s Preliminary Approvals.**

28 Petitioner concedes that the City *still* has not rendered a final decision issuing permits to  
Authentic or Wishon. (SAP, ¶ 23 [“Catalyst is informed and believes that neither Wishon nor  
Authentic have yet received issuance of a CCB Permit.”].) Nevertheless, on June 3, 2022,  
Petitioner filed the SAP seeking—essentially in an improper motion for reconsideration—to  
*again challenge the non-final preliminary approval of Authentic and Wishon’s permit*  
*applications* and now, to apparently compel the City of Fresno to reinstate Catalyst’s application.

1 (SAP, ¶ 7 [“in addition to challenging the final permit approvals for Wishon and Authentic,  
2 Catalyst herein now also challenges the City Manager’s denial of its application and seeks an  
3 order compelling the City to reinstate Catalyst’s application”]; *see also* ¶¶ 4, 46.)

4 Petitioner explicitly pleads that its claim sounds exclusively in traditional mandamus  
5 under Code of Civil Procedure Section 1084 and that Petitioner is not asserting a claim that  
6 sounds in administrative mandamus under Code of Civil Procedure Section 1094.5. (*Id.*, ¶¶ 24,  
7 46.) Petitioner alleges that Petitioner’s claim challenging *Authentic* and *Wishon*’s preliminary  
8 permit approvals is now magically ripe because the City denied *Petitioner*’s application in a letter  
9 that also explicitly states the City has not yet issued a final decision as to the applicants who  
10 received preliminary approval. (*Id.*, ¶ 7; RJN Ex. E [“At this juncture, the applicants who  
11 received preliminary approval *continue to work through the process of obtaining a final CCB*  
12 *permit*”].) Based on Petitioner’s denial alone (but no change in status to *Authentic* or *Wishon*),  
13 the SAP substituted all references to “preliminary approval” as to *Authentic* and *Wishon* (the  
14 specific term the City uses to designate this level of approval) with the term “final approval,”  
15 blatantly mischaracterizing the nature of this action to the Court. (SAP, ¶¶ 3–4, 17, 20–21.)

### 16 III. LEGAL STANDARD

17 A demurrer is sustained when the complaint’s allegations, taken as true, fail to state  
18 sufficient facts to constitute a cause of action. (Code Civ. Proc. § 430.10(e).) A demurrer should  
19 be sustained when the pleading discloses a bar to recovery. (*Cryolife, Inc. v. Superior Court*  
20 (2003) 110 Cal.App.4th 1145, 1152.) The Court considers “all material facts properly pleaded” as  
21 true, “but not contentions, deductions, or conclusions of fact or law.” (*Moore v. Anderson Zeigler*  
22 *Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1293.) The Court “also consider[s]  
23 the complaint’s exhibits,” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal. App. 4th 390,  
24 400), and “matters which are properly the subject of judicial notice and . . . treat[s] such matters  
25 as having been pleaded,” (*Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581, 589).

### 26 IV. THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND

27 This Court has already held that the City’s preliminary approvals—which Petitioner  
28 challenges here—are not final and therefore not subject to judicial review until and unless the City

1 issues final permits. The City has not yet issued final permits, so Petitioner’s challenge to  
2 Authentic and Wishon’s preliminary approvals remains unripe. Moreover, Petitioner cannot  
3 allege the requisite non-discretionary duty owed by the City to reinstate or issue Petitioner a  
4 permit, as required to state a claim for traditional mandamus, because the FMC provides that the  
5 City has wide discretion not to issue any permits and is under no obligation to issue maximum  
6 number of permits to anyone, let alone the Fourth Place Petitioner. Because a ministerial duty is  
7 required to plead traditional mandamus, the demurrer should be sustained without leave to amend.

8 **A. As Judge Brickey Already Ruled, Petitioner’s Challenge to Authentic’s Preliminary**  
9 **Approval Remains Unripe Because There Is No Final Decision as to Authentic.**

10 Petitioner’s SAP is little more than a brazen attempt to seek reconsideration of this Court’s  
11 prior order sustaining Authentic’s demurrer to the FAP by taking advantage of a new judicial  
12 assignment, without the facts to justify an amended pleading at this time. The Court should not  
13 countenance such gamesmanship and should sustain the demurrer without leave to amend.<sup>3</sup>

14 “A Petitioner in a mandamus action may only seek judicial review for administrative  
15 decisions that are *final*.” (May 25 Order at 1 [emphasis added]; *Tejon Real Estate, LLC v. City of*  
16 *L.A.* (2014) 223 Cal.App.4th 149, 156, *as modified on denial of reh’g* (Feb. 14, 2014) [review on  
17 writ of mandamus is premature until “the agency makes a final decision”]; *see also Pac. Legal.*  
18 *Found. v. Cal. Coastal Comm’n* (1982) 33 Cal.3d 158, 159 [“[A] basic prerequisite to judicial  
19 review of administrative acts is the existence of a ripe controversy.”].) “[A] controversy is not

20 \_\_\_\_\_  
21 <sup>3</sup> Petitioner’s SAP bears all the hallmarks of a sham pleading. In what can only be described as  
22 stunning lack of candor to the Court, Petitioner replaces all references to “Preliminary Approval”  
23 from the FAP—a term the City specifically uses to identify the stage of approval it awarded to  
24 applicants to date—with the term “final approval” in the SAP. (SAP ¶¶ 2 (“On September 8,  
25 2021, the City Manager selected Wishon for final permit approval”), 20 (“In September 2021 ...  
26 the City Manager issued final permit approval to applicants TAT and Wishon.”), 40 (“[T]he City  
27 Manager initially selected for final permit approval the top two applicants”); accord *id.* ¶¶ 3–4, 7,  
28 15, 17, 21, 46; RJN Ex. H [Preliminary Approval letter].) Not only is this untrue, but it  
contradicts Petitioner’s prior allegations, which were verified under penalty of perjury in which  
Petitioner specifically pleaded that the selection of applicants “is called ‘Preliminary Approval’  
by the City since the City only will actually issue a Permit upon successful completion of the  
required background check and the City’s land use permitting process. FMC §§ 9-3316(j), 9-  
3317(d); Guidelines at 5.” (Phillis Decl. & RJN Ex. N, ¶ 14.) As Petitioner well knows, the  
FMC, Guidelines, City documents, and Petitioner’s own pleadings contradict Petitioner’s  
mischaracterizations, and the Court should disregard them. (See *Davis*, 179 Cal.App.4th at 589).

1 ripe for adjudication until the administrative process is completed[.]” (May 25 Order at 1  
2 [citation omitted]; *Cal. Water Impact Network v. Newhall Cty. Water Dist.* (2008) 161  
3 Cal.App.4th 1464, 1489 [“Administrative proceedings should be completed before the issuance of  
4 a judicial writ.”]; see *Alta Loma Sch. Dist. v. San Bernardino Cty. Comm’n on Sch. Dist.*  
5 *Reorganization* (1981) 124 Cal.App.3d 542, 554 [judicial review is unavailable for “an  
6 intermediate or interlocutory action of an administrative agency”].) “A decision attains the  
7 requisite finality when the agency has exhausted its jurisdiction and possesses ‘no further power  
8 to reconsider or rehear the claim.’” (*AIDS Healthcare Found. v. State Dep’t of Health Care*  
9 *Servs.* (2015) 241 Cal.App.4th 1327, 1337–38.) “Finality may be defined either expressly in the  
10 statutes governing the administrative process or it may be determined from the framework in the  
11 statutory scheme.” (*Id.* at 1338.) “Until a public agency makes a ‘final’ decision, the matter is  
12 not ripe for judicial review.” (*Id.*)<sup>4</sup>

13 Because no final decision was rendered on Authentic and Wishon’s applications between  
14 May 25, 2022 and now, and because Plaintiff has not and cannot plead futility at this preliminary  
15 stage, this Court should sustain the demurrer on the grounds that there is no final decision ripe for  
16 this Court’s review. (*Alta Loma Sch. Dist., supra*, 124 Cal.App.3d at p.554; *AIDS Healthcare*  
17 *Found., supra*, 241 Cal.App.4th at pp. 1337–38.)

18 **1. There Has Been No Final Decision on Authentic’s Preliminary Approval Since**  
19 **the Last Demurrer Was Sustained on May 25, 2022, on Ripeness Grounds.**

20 This is not Petitioner’s first attempt to evade demurrer on this exact issue. Indeed, on May  
21

22 \_\_\_\_\_  
23 <sup>4</sup> This arises out of a fundamental issue of separation of powers. In such circumstances, “the need  
24 for judicial intervention might be obviated by the outcome of the administrative proceedings, [and  
25 judicial review] would also reward” applicants who refuse to comply with the enumerated  
26 licensing process, “while penalizing those who made a good faith effort to comply.” (*Tejon,*  
27 *supra*, 223 Cal.App.4th at p. 157 [noting this doctrine “favor[s] administrative autonomy (i.e.,  
28 courts should not interfere with an agency determination until the agency has reached a final  
decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an  
administrative dispute unless absolutely necessary)”].) Thus, where, as here, a petitioner seeks  
such premature review of a non-final administrative decision, the claims are subject to demurrer.  
(E.g., *id.* at 156–59 [affirming order sustaining demurrer where plaintiff sought review of  
administrative decision that was not yet final]; *AIDS Healthcare*, 241 Cal.App.4th at 1349  
[affirming order sustaining demurrer as to petition for writ of mandamus “[b]ecause the  
Department had not made a final determination”].)



1 25, 2022, Judge Brickey sustained Authentic’s demurrer and dismissed the First Amended  
2 Petition specifically because “the City Manager has not issued a final decision” because it has  
3 “only” issued “preliminary” approval, and “there does not exist a ‘ripe controversy.’” (May 25  
4 Order at 2.) Indeed, Judge Brickey rightly found:

5 **In this action, the City Manager has not issued a final decision.**  
6 Following the preliminary approval, **a successful applicant must**  
7 **complete nine additional steps before final approval.** (Authentic  
8 Ex. B at 3-6; FMC §§ 9-3305, 9-3317(d) & (h), 9-3329). Further,  
9 an appeal is provided 15 days after the final approval is made.  
10 (FMC § 9-3317(c).) “In the context of administrative proceedings,  
11 a controversy is not ripe for adjudication until the administrative  
12 process is completed and the agency makes a final decision that  
13 results in a direct and immediate impact on the parties.”  
14 (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253,  
274-275, quoting *Santa Barbara County Flower & Nursery*  
*Growers Assn. v. County of Santa Barbara* (2004) 121 Cal.App.4th  
864, 875.) **In the instant action, there does not exist a “ripe**  
**controversy” because the decision by the Respondent is only**  
**preliminary.** (*Pacific Legal Foundation v. California Coastal*  
*Corn.* (1982) 33 Cal.3d 158, 169.)

15 (May 25, 2022, Order [the “May 25 Order”] at 1–2 [bold underline added].)

16 As previously briefed to this Court, the City has made abundantly clear in the Fresno  
17 Municipal Code and the Guidelines that preliminary approval of candidates’ applications is *not a*  
18 *final decision*. *First*, the FMC and Guidelines provide that those applicants selected for  
19 preliminary approval, i.e., the “prevailing *candidates*,” will have to satisfy several conditions  
20 before the City Manager will “*formally issue the commercial cannabis permit(s)*,” i.e., render a  
21 final decision on the applications. (FMC § 9-3317(d) [emphasis added]; accord SAP, Ex. B at 3–  
22 6; see also FAP, ¶ 14 [“[T]he City will only actually issue a Permit upon successful completion of  
23 the required background check and the City’s land use permitting process.”]; RJN Ex. H [“Final  
24 approval of the CCB Permit is contingent on approval of the following requirements, along with  
25 all applicable requirements set forth in the Fresno Municipal Code”].) These conditions include,  
26 for example, submitting applications to other city departments for approval, obtaining a state  
27 cannabis license, paying certain fees, passing a property inspection, and satisfying the City  
28 Manager’s background checks. (FMC § 9-3317(d); RJN Exs. H, K.) *Second*, the City repeatedly

1 reminded applicants in the Guidelines of the possibility that even after Preliminary Approval is  
2 granted “a permit awardee [may] fail[] to meet the conditions that must be satisfied in order to  
3 obtain official issuance of a CCB permit.” (Phillis Decl. & RJN Ex. H.)

4 The facts surrounding the lack of finality of the Authentic and Wishon decisions have not  
5 changed since this Court’s order sustaining Authentic’s demurrer on May 25, 2022. Indeed,  
6 Petitioner concedes that both Authentic and Wishon still have not obtained final approval or  
7 otherwise satisfied at least *nine* additional criteria necessary to obtain a final permit, including  
8 additional background checks and issuance of a Conditional Use Permit (which falls under the  
9 purview of the Planning Commission, not the City Manager). (SAP, ¶ 23 & Ex. B at 3–6; FMC  
10 §§ 9-3305, 9-3317(d) & (h), 9-33299-3317(d) & (h), 9-3329; (b); RJN Ex. H & L [May 25 Order]  
11 at 1). This alone is sufficient ground on which to sustain the demurrer, for exactly the same  
12 reasons stated in Judge Brickey’s order.

13 The one development that has occurred since May 25, 2022, is that the City has now  
14 *denied* Petitioner’s application—but that does not have any impact on the finality of the decisions  
15 as to Authentic and Wishon (the decisions that form the basis of Petitioner’s claim) or otherwise  
16 render complete the City’s administrative process. Indeed, Fresno’s Municipal Code makes clear  
17 that, in fact, the City Manager is under no obligation to issue *any* cannabis licenses under the  
18 permitting process, let alone the maximum number of licenses authorized by the City. (FMC §§  
19 9-3306(e), (f), 3317(f).) To the contrary, the City expressly retains the discretion “to limit the  
20 number of commercial cannabis permits to less than what is allowed” in the Municipal Code, and  
21 unequivocally admonishes each applicant that “[n]othing in this Article creates a mandate that the  
22 City Manager must issue any or all of the commercial cannabis business permits.” (FMC § 9-  
23 3306(e), (f).) Petitioner’s implicit assumption that the denial of *Catalyst’s application* somehow  
24 ripens the permitting decision *as to Authentic’s application* thus fails as a matter of law because  
25 it is unequivocally foreclosed by the plain language of the Fresno Municipal Code.

26 Indeed, even Petitioner’s May 31, 2022, denial letter (on which Petitioner essentially  
27 hangs its entire SAP, but which Petitioner inexplicably refused to produce to both Authentic and  
28 Wishon during conferral efforts) makes clear that the denial of Catalyst’s application has no

1 impact on the specific decisions as to the remaining applicants, which remain ongoing and subject  
2 to considerable uncertainty, particularly given redistricting, the appointment of a new City  
3 Manager, and multiple appeals of the preliminary approvals:

4 Over eight months have elapsed since the date of the above-  
5 referenced notice. During this time, several significant events  
6 transpired, including, but not limited to, redistricting, the  
7 appointment of a new City Manager and the consideration of  
8 multiple appeals by the City Council arising out of the preliminary  
award of CCB permits. ***At this juncture, the applicants who  
received preliminary approval continue to work through the  
process of obtaining a final CCB permit.***

9 (RJN Ex. E [emphasis added].)

10 Because Petitioner has not and cannot to cure its prior pleading defects as to the lack of  
11 finality of the permit decisions for Authentic (or Wishon), Authentic’s ripeness challenge again  
12 forecloses judicial review of Authentic’s preliminary approval at this time. (*Alta Loma Sch. Dist.*,  
13 *supra*, 124 Cal.App.3d at p.554; *AIDS Healthcare, supra*, 241 Cal.App.4th at pp.1337–38.)

14 **2. This Court Should Reject Petitioner’s Repeat “Futility” Arguments Because**  
15 **the City Has Not “Made Up Its Mind” About Final Permit Issuance.**

16 Petitioner’s threadbare attempt to invoke the futility doctrine—an argument that was  
17 already briefed and rejected by Judge Brickey on Authentic’s first demurrer—likewise fails  
18 because Petitioner admits that the City Manager does not control the remainder of the  
19 requirements for Authentic to obtain final approval, and therefore could not have possibly stated  
20 with certainty what the City’s ultimate decision will be with regard to preliminary approval.  
21 (SAP, ¶ 25 [speculating that “the City Council and the City Manager have ‘made up their minds’”  
22 as to the alleged “grounds for automatic disqualification”].)

23 To allege futility, Petitioner must “positively state that the administrative agency has  
24 declared what its ruling will be in a particular case.” (*Steinhart v. Cnty. of L.A.* (2010) 47 Cal.4th  
25 1298, 1313 [no futility where no indication of “predetermined” position]; *Coachella Valley*  
26 *Mosquito & Vector Control Dist. v. Cal. Pub. Emp’t Relations Bd.* (2005) 35 Cal.4th 861, 870.)

27 Here, Petitioner’s verified allegations foreclose any finding of futility because Petitioner  
28 admits that even if the City Manager has made up its mind as to a single issue, many of the

1 remaining criteria to be satisfied by both Authentic and Wishon fall outside the purview of the  
2 City Manager. Thus, because Petitioner admits it cannot state with certainty what the City of  
3 Fresno’s decisions will be with regard to Authentic’s CUP application, final background checks,  
4 and the plethora of remaining criteria necessary to be considered for final approval—including  
5 whether the City will exercise its discretion to deny the application or change the permitting  
6 process—Petitioner falls far short of specifically establishing that “the administrative agency has  
7 declared what its ruling will be” on Authentic’s permit application as a whole. (*Coachella Valley*,  
8 25 Cal.4th at 870 “[I]t is not sufficient that a party can show what the agency’s ruling would be  
9 on a particular *issue*” as opposed to the “case” as a whole]; *Steinhart*, 47 Cal.4th at 1313; see also  
10 *People ex rel. State Pub. Wks. Bd. v. Superior Court* (1979) 91 Cal.App.3d 95, 104 [commission’s  
11 positions “should not be inferred from general comments of staff”].)

12 Petitioner does not and cannot allege any facts to support futility because (1) many of the  
13 unsatisfied remaining conditions are subject to the approval of different and separate bodies, e.g.,  
14 Planning Commission approval of the CUP,<sup>5</sup> so the City Manager’s decision on “preliminary  
15 approval” is not sufficient to bind them; and (2) in any event, the City and City Manager recent  
16 May 31, 2022, correspondence makes clear that the future of Fresno’s cannabis program (as well  
17 as any forthcoming final approvals) remain very much in flux. The administrative process  
18 remains plainly incomplete as to both Authentic and Wishon and the City still maintains  
19 jurisdiction over the permitting process and its intermediary (or “preliminary”) decisions. (See  
20 *Alta Loma, supra*, 124 Cal.App.3d at 554.) The Court therefore, as before, should sustain  
21 Authentic’s demurrer, as “there does not exist a ‘ripe controversy’ because the decision by  
22 Respondent is only preliminary.” (Phillis Decl. & RJN Ex. L [May 25 Order] at 2.)

23 **B. Petitioner’s Claim Fails to Allege a Ministerial Duty to Award Catalyst a Permit.**

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25 <sup>5</sup> The fact that the CUP and other permit applications fall outside the jurisdiction of the City  
26 Manager (SAP, ¶ 17) further underscores the lack of finality because “[a] statement of opinion by  
27 [agency] representatives other than the body charged with hearing and deciding the conditions  
28 under which the proposed residence can be built is not sufficient to allow Appellant to invoke  
futility.” (*Tejon Real Estate, LLC v. City of L.A., supra*, 223 Cal.App.4th at p. 158; FMC § 15-  
5303 [stating that the Development and Resource Management Director (“Director”) is vested  
with the authority to review, approve, conditionally approve, or deny applications, which may  
also be referred to the Planning Commission].)

1 Beyond the fundamental lack of ripeness of Authentic and Wishon’s preliminary  
2 approvals, Petitioner has not and cannot plead the requisite clear non-discretionary, ministerial  
3 duty necessary to state a claim for traditional mandamus. A writ of traditional mandamus  
4 pursuant to Code of Civil Procedure § 1085 is designed to order “performance of an act” that the  
5 law specifically requires. Thus, it requires a petitioner allege both: “(1) a clear, present and  
6 usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right  
7 in the petitioner to performance of that duty.” (*Keyes v. Bowen* (2010) 189 Cal. App. 4th 647,  
8 656.) “A ‘ministerial duty’ is one generally imposed upon a person in public office who, by  
9 virtue of that position, is obligated ‘to perform in a prescribed manner required by law when a  
10 given state of facts exists’”—in other words, **a non-discretionary duty**. (*Flores v. Dep’t of*  
11 *Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205.) “Mandamus will not lie to  
12 control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular  
13 manner.” (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442.)

14 Thus, a petitioner must specifically identify the legal source of the alleged duty, i.e., the  
15 statute or ordinance. (*See Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 292-293 [“[A]  
16 litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable  
17 statute or regulation.”].) Where a mandamus petitioner fails to allege a non-discretionary duty  
18 owed by the Respondent to the Petitioner, the Court should sustain the demurrer. (*Keyes, supra*,  
19 189 Cal.App.4th at p.657–58 [affirming sustaining of demurrer where Petitioner failed to allege  
20 ministerial duty to grant Petitioner the relief she sought].)

21 *Keyes* is instructive. There, the plaintiffs filed a petition for writ of mandate to prevent  
22 California’s secretary of state and presidential electors from certifying the names of candidates for  
23 inclusion on the presidential ballot without first ensuring they were eligible to serve as president.  
24 The Superior Court sustained the demurrer without leave to amend and the Court of Appeal  
25 affirmed on the grounds that “plaintiffs did not identify any ministerial duty the Electors failed to  
26 perform, nor demonstrate that they had a ministerial duty to determine if their party’s nominee is a  
27 natural born citizen.” (*Keyes, supra*, 189 Cal.App.4th at p.657.) The Court acknowledged that  
28 the Electors had a ministerial, non-discretionary duty to “vote for President and Vice President”

1 (3 U.S.C. § 8), but after examining the relevant statutes, explained they imposed “no obligation  
2 that the Electors first determine whether the presidential candidate is eligible for office.” (*Ibid.*)

3 The same logic dictates the same result here. Petitioner asserts that it “challenges the City  
4 Manager’s denial of its application and seeks an order compelling the City to reinstate Catalyst’s  
5 application and then select it for a permit,” ***but nowhere in Petitioner’s Second Amended***  
6 ***Petition does Petitioner identify any affirmative, non-discretionary obligation of the City of***  
7 ***Fresno to issue these highly discretionary permits to Petitioner.*** (See *supra* SAP ¶¶ 21–24, 27–  
8 28, 35, 44.) Indeed, Petitioner ***cannot*** identify any such ministerial duty because Fresno’s  
9 Municipal Code says precisely the opposite—that the City Manager expressly “has discretion to  
10 limit the number of permits to less than what is allowed,” and further that the City Manager  
11 “reserves the right to reject any or all applications if he/she determines it would be in the best  
12 interest of the City, taking into account any health safety and welfare impacts on the community.”  
13 (FMC §§3306, subd. (e), (f); 9-3317, subd. (f).) The City also maintains discretion to cancel the  
14 permitting program at any time and to deny any application at any time without reason. (FMC  
15 § 9-3316(k); SAP, Ex. B at 2.) And lest there be any doubt, the FMC provides: “***Nothing in this***  
16 ***Article creates a mandate that the City Manager must issue any or all of the commercial***  
17 ***cannabis business permits.***” (FMC § 9-3306(f) [emphasis added].) It similarly provides  
18 “[a]pplicants shall have no right to a commercial cannabis business permit. Each applicant  
19 assumes the risk that, at any time prior to the issuance of a permit, the City Manager may  
20 terminate or delay the program...” (FMC § 9-3317(f); accord *id.* § 9-3326(k).)

21 These provisions leave one conclusion: the City has no ministerial duty, let alone one that  
22 is “clear,” to issue a permit to Petitioner. Petitioner’s allegations regarding the City’s purported  
23 ministerial duty to deny Authentic and Wishon’s applications cannot cure this failure, because  
24 even if the City were to deny those applications (though there are no grounds to do so, and such  
25 challenge is not ripe), the City still has no duty to approve or issue ***Petitioner*** a permit.

## 26 V. CONCLUSION

27 For all these reasons, the Court should sustain Authentic’s demurrer without leave to  
28 amend.

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DATED: August 5, 2022

DAVIS WRIGHT TREMAINE LLP  
NICOLE S. PHILLIS  
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JOHN A. GOLDMARK



By: \_\_\_\_\_  
Nicole S. Phillis

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AUTHENTIC 559, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 865 S. Figueroa Street, Suite 2400, Los Angeles, CA 90017.

On August 5, 2022, I served the document described as “**REAL PARTY IN INTEREST AUTHENTIC 559, LLC’S NOTICE OF DEMURRER AND DEMURRER TO THE SECOND AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS AND COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**” upon the interested parties in this action addressed as follows:

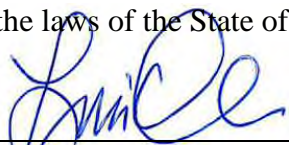
SEE ATTACHED SERVICE LIST

(VIA EMAIL) By forwarding a portable document file to the electronic mail address(es) below from electronic mail address linapearmain@dwt.com, at Suite 2400, 865 South Figueroa Street, Los Angeles, California 90017.

(VIA U.S. MAIL) I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service. I am familiar with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service, which practice is that when correspondence is deposited with the Davis Wright Tremaine LLP, personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the ordinary course of business.

Executed on August 5, 2022, Los Angeles, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
\_\_\_\_\_  
LINA PEARMAIN



ATTACHED SERVICE LIST

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