

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel.
BOARD OF PHARMACY, a
public entity of the State of
Nevada

Appellant,

vs.

CANNABIS EQUITY AND
INCLUSION COMMUNITY
(CEIC), a domestic non-profit
organization; and ANTOINE
POOLE, an individual,

Respondents.

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Case No.: 85756 Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENTS' RESPONSE TO APPELLANT'S MOTION FOR
STAY OF JUDGMENT AND ORDER GRANTING PETITION FOR
WRIT OF MANDAMUS**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

CANNABIS EQUITY AND INCLUSION COMMUNITY (CEIC) is a domestic nonprofit corporation organized and existing under and by virtue of the laws of the State of Nevada. CEIC does not have parent corporations and no corporation owns 10% or more of the party's stock.

The American Civil Liberties Union (ACLU) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been our nation's guardian of liberty for over 100 years. The ACLU works to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU of Nevada does not have parent corporations and no corporation owns 10% or more of the party's stock.

Antoine Poole is an individual, therefore there are no parent corporations or publicly held companies that own 10% or more of the party's stock.

The undersigned counsel of record further certifies that the ACLU of Nevada, and its attorneys, Sadmira Ramic, Christopher M. Peterson, and Sophia A. Romero, are the only attorneys who have appeared for the parties in the case (including proceedings in the district court) or are expected to appear in this Court.

**AMERICAN CIVIL LIBERTIES
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/s/ Sadmira Ramic _____

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MEMORANDUM OF POINTS AND AUTHORITIES

RELEVANT FACTS AND PROCEDURAL HISTORY

The District Court granted Respondents' petition for a writ of mandamus and issued an order mandating that the Nevada Board of Pharmacy ("the Board") 1) remove cannabis and its derivatives from the list of Schedule I substances, and 2) cease the regulation of substances subject to regulation under Title 56.¹ The District Court based this order on facts undisputed by either party.²

The Board filed a Notice of Appeal and a Motion to Stay Judgment and Order Pending Appeal before the District Court; Respondents opposed.³ Making the necessary findings of fact and law, the District Court denied the Board's motion for stay finding that the Board did not meet its burden under NRAP 8(c).⁴

¹ Resp'ts App, Vol. 1, APP0061-62.

² *Id.*

³ Resp'ts App, Vol. 1, APP0062-66; APP 0067-74; APP0075-84.

⁴ Resp'ts App, Vol. 1, APP 0097-104.

DISCUSSION

I. LEGAL STANDARD

NRAP 8(a) requires that a party applying for a stay of a judgment or order pending appeal must first apply for a stay from the district court that issued the order as that district court would be most familiar with the facts and circumstances of the case. *Nelson v. Heer*, 121 Nev. 832, 836 122 P.3d 1252 (2005).

In determining whether a stay should be granted, NRAP 8(c) outlines four relevant factors that must be considered: 1) whether the object of the appeal will be defeated if the stay is denied; 2) whether appellant will suffer irreparable or serious injury if the stay is denied; 3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and 4) whether appellant is likely to prevail on the merits of the appeal. No one factor carries more weight than the others. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004). However, the burden is on the party seeking the stay to establish each factor. *See Fritz Hansen A/S v. Eighth Judicial Dist. Ct.*, 116 Nev. 650, 657 – 59 (2000) (evaluating whether the moving party had offered sufficient factual basis to support its request for a stay).

II. ARGUMENT

A. The object of the appeal will not be defeated if the motion to stay is denied because the Board, if successful on appeal, may promulgate a regulation placing cannabis back on the list of controlled substance.

The object of the Board’s appeal is to maintain its authority to regulate cannabis as a controlled substance. Unlike a right to physical property or a tangible good, *see Brannan v. Fredrick*, No. 74695, 2018 Nev. Unpub. LEXIS 1215 (November 5, 2018) (finding that the objective of the appeal would be defeated if the property sold), the right at issue is purely legal in nature. And unlike property that can be sold or a good that can be altered, the contested authority can be restored intact if the Board is successful on appeal even if the requested stay is denied –the contested authority cannot be damaged while this appeal is pending.

The Board claims that if this Court fails to grant a stay, the Board’s appeal will be rendered “moot”.⁵ This is a peculiar position – pursuant to the Board’s logic, its appeal would already be moot due to the District Court’s denial. However, considering that the objective of the appeal is the scope of the Board’s authority rather than how the Board uses that

⁵ Appellant’s Mot. for Stay of J. and Order Granting Pet. for Writ of Mandamus (“Mot.”) at 3–4.

authority, the objective of the appeal will not be defeated if the request is denied.

B. CEIC, Mr. Poole, and the public will suffer irreparable or serious injury if the stay is granted.

Nevada courts have held that harm is generally "irreparable" when it cannot be adequately remedied by compensatory damages. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 183 P.3d 895,901 (2008) citing *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

The District Court found, based upon undisputed facts and evidence offered by the Board in its filings before the District Court, that CEIC and the public will suffer irreparable harm if a stay is granted.⁶ The Board mischaracterizes the District Court's finding regarding this factor in its motion;⁷ the Court's finding was not that individuals would be "unjustly prosecuted" but that granting the Board's request for a stay would result in unconstitutional arrests, incarcerations, and convictions using criminal laws that rely on the Board's designation of cannabis as a

⁶ Resp'ts App, Vol. 1, APP 0101-102.

⁷ Mot. at 6.

controlled substance as an element of the offense.⁸ And that finding was not mere speculation by the District Court: the Board itself offered an affidavit from Las Vegas Metropolitan Police Department that the Department will to continue to arrest and incarcerate individuals pursuant to those cannabis-related offenses in its filings before the District Court.⁹

As to the Board's repeated contention that NAC 453.510, which is the regulation that designates all schedule I controlled substances, is unrelated to prosecutions in this State for offenses predicated on such schedule I designations,¹⁰ this is simply not true. Removing cannabis from NAC 453.510 bars prosecutors from charging individuals with offenses related to schedule I substances.

Finally, as for Mr. Poole and CEIC members who have already been convicted under such statutes, they too would suffer irreparable harm because the District Court's ruling provides them with legal remedies that they would otherwise not be able to pursue if the motion is granted.

⁸ Resp'ts App, Vol. 1, APP 0102.

⁹ Resp'ts App, Vol. 1, APP 0094-95.

¹⁰ Mot. at 5.

C. The Board has not demonstrated that it will suffer irreparable or serious injury if the motion is denied.

The Board argues it will suffer irreparable harm if the stay is not granted because 1) the District Court had no legal basis for directing the Board to redraft NAC 453.510 and 2) the order violates the separation of powers doctrine by intruding upon the Board's agency powers.¹¹ While these arguments relate more to the merits of the Board's appeal than any harm the Board may suffer, even if properly considered pursuant to this factor, these arguments are contradicted by this Court's precedent and the Board's own regulations.

It is well established that Nevada's courts have jurisdiction over Nevada's regulatory agencies and the authority to find that an agency has acted unconstitutionally in promulgating a regulation. This is true even in the context of the Board's authority to promulgate controlled substances. *See Miller v. Jacobson*, 104 Nev. 600, 604–05, 763 P.2d 356, 358–59 (1988) (striking down the Board's designation of phenylacetic acid as a controlled substance). The Board has not provided any applicable

¹¹ Mot. at 7.

legal authority to the contrary.¹² In fact, the Board's argument appears to contradict their own regulations, which acknowledge that a district court can find that a regulation is unconstitutional and strike it down. NAC 639.110.

D. The Board has failed to show that it is likely to prevail on the merits of the appeal.

A movant must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs *heavily* in favor of granting the stay. *Fritz Hansen A/S*, 116 Nev. at 659, 6 P.3d at 987 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). The Board, again, has not met this burden.

The District Court granted Respondents' petition and found that the Board no longer has the authority to regulate cannabis. The Board has offered no valid arguments as to why it would now prevail in this court on either issue. The Board argues that it does not regulate

¹² The cited case in the Board's motion, *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 287, 212 P.3d 1098, 1100 (2009), is irrelevant as it deals solely with an issue related to the unconstitutional delegation of power by the Legislature, not the authority of Nevada courts to restrain Executive agencies from engaging in unconstitutional conduct.

marijuana but schedules substances.¹³ However, it fails to appreciate that under Nevada law, the act of placing a substance in the enumerated schedules constitutes regulation of that substance. *See Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 152, 697 P.2d 107, 109 (1985) (“NRS 453.146 expressly authorized the state pharmacy board to [...] add substances to or delete or reschedule all substances enumerated in the schedules *by regulation*.”) (emphasis added). Additionally, the Board lists multiple examples of how it regulates cannabis and specifically labels them as a regulation of cannabis.¹⁴ To the extent that the Board is claiming that it does not have the authority to regulate cannabis¹⁵, we agree. As such, the Court should question the purpose and necessity of this motion and the appeal.

E. The Board inappropriately raises several new issues in its motion that it failed to raise in District Court, and they should not be considered.

¹³ Mot. at 3.

¹⁴ Mot. at 7.

¹⁵ Mot. at 8, “marijuana falls largely outside the scope of the Board’s regulatory jurisdiction” and “NAC 453.510 does not signal the Board’s intention to regulate marijuana, as that function falls squarely within the jurisdiction of the Nevada Cannabis Compliance Board.”

This Court should not consider any arguments in the Board's motion that were not raised before the District Court. In addition to the general principle that points that were not raised before the lower court will not be considered on appeal, *see Old Aztec Mine v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981) (finding that a point not raised in the trial court will not be considered on appeal), allowing the Board to raise arguments in a motion for a stay before this Court not raised before the District Court would defeat the purpose of NRAP 8(a) in allowing the District Court, as the court most familiar with the facts and circumstances of the matter, to base its ruling on all potential arguments.

The Board has raised several arguments in its motion that it did not raise in its motion for a stay in District Court including 1) it would suffer irreparable harm if the stay is denied because removing cannabis from the list of schedule substances would render its appeal moot;¹⁶ 2) it is likely to succeed on the merits of its appeal because it does not regulate cannabis;¹⁷ and 3) it is likely to succeed on the merits of its appeal

¹⁶ Mot. at 3–4.

¹⁷ Mot. at 3.

because some Nevada statutes serve as evidence that the Nevada Legislature intended to maintain consistency between the federal and state regulatory schemes.¹⁸ While Respondents do not believe that these arguments are particularly persuasive, they still ask that this Court disregard the points as improperly raised in the motion.

CONCLUSION

As set forth above, the Board has not satisfied the elements under NRAP 8(c) and its motion should be denied in its entirety.

DATED this 28th day of February 2023.

Respectfully submitted:
**AMERICAN CIVIL LIBERTIES
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¹⁸ Mot. at 8.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2023, I electronically filed the foregoing **RESPONDENTS' RESPONSE TO APPELLANT'S MOTION FOR STAY OF JUDGMENT AND ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** with the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that a true and correct copy of this document was served by email to:

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/s/ Sadmira Ramic
Sadmira Ramic
An employee of the ACLU of Nevada