

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 85756

STATE OF NEVADA, ex rel. Board of Pharmacy
a public entity of the State of Nevada,

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Elizabeth A. Brown
Clerk of Supreme Court

Appellant,

v.

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

Respondents.

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

RESPONDENTS' APPENDIX, VOL. 1

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DOCUMENT	DATE	VOLUME	PAGE(S)
Judgment and Order Granting Petition for Writ of Mandamus and Request for Declaratory Relief, October 26, 2022	10/26/2022	1	45-63
Notice of Appeal from the Judgment and Order Granting Petition for Writ of Mandamus, November 23, 2022	11/23/2022	1	64-66
Order Denying Respondent's/Defendant's Motion to Stay Judgment and Order Pending Appeal, February 8, 2023	2/8/2023	1	97-104
Petition for a Writ of Mandamus to Compel the Nevada State Board of Pharmacy to Remove Cannabis and Other Cannabis Derivatives from Nevada Administrative Code § 453.510 as Schedule I Substances and Complaint for Declaratory and Injunctive Relief, April 15, 2022	04/15/2022	1	1-26
Petitioners'/Plaintiffs' Opposition to Respondent's/Defendant's Motion to Stay Judgment and Order Pending Appeal, December 7, 2022	12/7/2022	1	75-84
Respondent/Defendant's Answer to Petitioners'/Plaintiff's Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, August 10, 2022	8/10/2022		27-44
Respondent/Defendant's Motion to Stay Judgment and Order Pending Appeal, November 23, 2022	11/23/2022	1	67-74
Respondent/Defendant's Reply Memorandum of Points and Authorities on Motion to Stay Judgment and Order Pending Appeal, December 20, 2022	12/30/2022	1	85-96

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2023, I electronically filed the foregoing Appendix 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.

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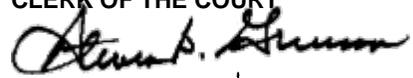
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CASE NO: A-22-851232-W
Department 32

10 EIGHTH JUDICIAL DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 CANNABIS EQUITY AND INCLUSION
13 COMMUNITY (CEIC), a domestic nonprofit
14 corporation; ANTOINE POOLE, an individual,
15
16 Petitioners/Plaintiffs,

17 vs.

18 STATE OF NEVADA ex rel. BOARD OF
19 PHARMACY, a public entity of the State of
Nevada,
Respondent/Defendant.

Case No.:

Department:

HEARING REQUESTED

**ARBITRATION EXEMPTION
CLAIMED:**

Equitable and Extraordinary Relief
Requested

20 **PETITION FOR WRIT OF MANDAMUS TO COMPEL THE NEVADA STATE BOARD**
21 **OF PHARMACY TO REMOVE CANNABIS AND OTHER CANNABIS DERIVATIVES**
22 **FROM NEVADA ADMINISTRATIVE CODE § 453.510 AS SCHEDULE I SUBSTANCES**
23 **AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

24 The Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (CEIC) and Antoine
25 Poole, by and through counsel Sadmira Ramic, Esq., Christopher M. Peterson, Esq., and Sophia
26 A. Romero, Esq., of the American Civil Liberties Union of Nevada, hereby bring this Petition for
27 Writ of Mandamus (NRS Chapter 34) and Complaint for declaratory (NRS Chapter 30) and

1 injunctive relief (NRS Chapter 33). Petitioners are seeking an order directing
2 Respondent/Defendant, the Nevada State Board of Pharmacy (“the Board” or “Respondent”), to
3 remove marijuana, cannabis, and cannabis derivatives from NAC 453.510 as Schedule I
4 substances, as well as reasonable costs in attorney’s fees pursuant to NRS 18.010.

5 INTRODUCTION

6 Over the last few decades there has been a shift in attitude towards marijuana in American
7 communities and strides have been made to decriminalize marijuana’s use medically and
8 recreationally in many states including Nevada. Unfortunately, the Nevada Board of Pharmacy has
9 failed to amend its schedule of controlled substances to keep pace with the changes in Nevada law;
10 the schedule is now in violation of our state’s constitution and statutes.

11
12 In 1998 Nevada voted on the *Nevada Medical Marijuana Act*, a referendum initiative
13 intended to amend the Nevada Constitution to legalize marijuana for medical use in Nevada.¹ It
14 passed in two consecutive elections, as is required for a constitutional amendment, with resounding
15 majorities.² Successful passage of the *Nevada Medical Marijuana Act* resulted in the addition of
16 Article 4, Section 38, of the Nevada Constitution, which enshrined cannabis’s medical value in
17 our constitution and required that the state legislature pass laws authorizing the distribution and
18 use of marijuana for medical purposes in Nevada.³

19
20 In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*,
21 which enacted law permitting the legal possession of marijuana for recreational purposes.⁴ The
22 intent behind legalizing recreational use of marijuana was two-fold: 1) cease the diversion of law
23

24
25

¹ Scott McKenna, *Medical Marijuana Laws in the Silver State*, 6 Nevada Lawyer, Aug. 10, 2002.

26 ² *Id.*

27 ³ N.V. Const. art. IV, § 38.

⁴ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
<https://www.nvsos.gov/sos/home/showdocument?id=3294>.

1 enforcement resources needed to prevent violent and property crimes to persecuting marijuana
2 offenses; and 2) regulate marijuana in the same manner as alcohol.⁵

3 Despite the passage of the *Nevada Medical Marijuana Act* and the *Initiative to Regulate*
4 *and Tax Marijuana*, the State, specifically the Nevada State Board of Pharmacy, has failed to take
5 action to comport with the will of Nevada voters, the Nevada Constitution, and Nevada Revised
6 Statutes. Instead of removing marijuana, cannabis, and cannabis derivatives from NAC 453.510's
7 list of controlled substances, the Board has continued to regulate them as Schedule I substances, a
8 category reserved for substances that have no medical purpose and cannot be safely distributed
9 such as methamphetamine, heroin, and cocaine. This failure to amend Nevada's Schedule of
10 Controlled Substances is necessarily a constitutional and statutory violation that can only be
11 remedied by removing marijuana, cannabis, and cannabis derivatives from the list of Schedule I
12 substances.
13

14 PARTIES

15
16 1. Petitioner/Plaintiff, CANNABIS EQUITY AND INCLUSION COMMUNITY
17 (CEIC) is, and was at all times relevant herein, a domestic nonprofit corporation organized and
18 existing under and by virtue of the laws of the State of Nevada. CEIC advocates for freedom,
19 equity, and opportunity in Nevada's cannabis market by supporting people from underrepresented
20 communities as they apply for licenses to participate in the legal cannabis market. CEIC has also
21 dedicated resources to mitigating Nevada's long history of prosecuting cannabis-related offenses
22 by assisting individuals with prior cannabis-related criminal convictions in applying for pardons
23 and sealing criminal records. CEIC continues to engage in community outreach to identify these
24 individuals and organize record sealing workshops.
25

26
27 ⁵ *Id.*

1 6. Venue is proper in this Court pursuant to NRS 13.020 and 13.040 because the cause,
2 or some part thereof, arose in the City of Las Vegas, Clark County, Nevada. Additionally, the
3 Respondents operate and/or reside in Clark County.

4 **STANDING**

5 7. A petitioner has standing in a proceeding on an extraordinary writ when the
6 petitioner has a “beneficial interest” in obtaining writ relief. “[A] beneficial interest sufficient to
7 pursue a mandamus action” is a “substantial interest that falls within the zone of interests to be
8 protected by the legal duty asserted.”⁷ In other words, the writ of mandamus must be denied if the
9 petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.⁸

10 8. CEIC has organizational standing in this matter because a) its organizational
11 mission was frustrated; and (2) it had to divert resources to combat the particular injurious behavior
12 in question.⁹ If the writ of mandamus is denied, CEIC will continue to suffer these detriments,
13 and if it is granted, it will gain a direct benefit.

14 9. CEIC has associational standing in this matter because a) its members would
15 otherwise have standing to sue in their own right; b) the interests it seeks to protect are germane
16 to the organization’s purpose; and c) neither the claim asserted nor the relief requested requires the
17 participation of individual members in the lawsuit.¹⁰

18 ///

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22 ⁷ *Id* at 460-61 (citing *Lindelli v. Town of San Anselmo*, 111 Cal.App.4th 1099, 4 Cal.Rptr.3d 453, 461 (2003)).

23 ⁸ *Id.* (citing *Waste Management v. County of Alameda*, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740, 747 (2000)).

24 ⁹ “An organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its
25 organizational mission; and (2) diversion of its resources to combat the particular housing discrimination in
26 question.” *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004).

27 ¹⁰ “[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its
members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to
the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of
individual members in the lawsuit.” *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97
S.Ct. 2434, 53 L.Ed.2d 383 (1977). *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d
1299, 1316 (11th Cir. 2021).

1 21. The Board’s authority to categorize a substance as Schedule I is limited by NRS
2 453.166, which states:

3 The Board shall place a substance in schedule I if it
4 finds that the substance:

- 5 1. Has high potential for abuse; *and*
6 2. Has no accepted medical use in treatment in
7 the United States or lacks accepted safety for use in
8 treatment under medical supervision.

9 (emphasis added).

10 22. Several Nevada Revised Statutes reference the classifications designated by the
11 Board to criminalize activities related to controlled substances.²¹

12 23. In 1998, Nevada voted on and passed the *Nevada Medical Marijuana Act*, a ballot
13 initiative intended to amend the Nevada Constitution to legalize marijuana for medical use in
14 Nevada.²²

15 24. Successful passage of the *Nevada Medical Marijuana Act* resulted in the addition
16 of Article 4, Section 38, of the Nevada Constitution, which states:

17 ²¹ For example, NRS 453.337 makes it unlawful to possess for sale any amount of a Schedule I substance. Penalties
18 for violating NRS 453.337 are based on whether the offender is a subsequent offender, with the first offense being a
19 Category D felony. Because marijuana is classified as a Schedule I substance, it is a Class D felony to possess *any*
20 amount of marijuana for sale. To put this into perspective, if an individual sells even a tenth of a gram of marijuana
without a license, they would be charged with a Class D felony for their first offense and even steeper penalties for
any subsequent sales. This is a dramatic departure from marijuana being treated like alcohol given that an individual
selling any amount of alcohol without a license is simply fined for selling alcohol without a license. *See* NRS
364.150.

21 As another example, NRS 453.336 criminalizes possession of a controlled substance not for purpose of sale. It
22 states, “[a] person who violates this section shall be punished for the first or second offense, if the controlled
23 substance is listed in schedule I, II, III or IV, for a category E felony as provided in NRS 193.130.” Because
24 marijuana was not legalized for individuals under 21 years of age and it is classified as a Schedule I substance, NRS
453.336 is being used to charge juveniles and persons under 21 years old with felony offenses for possessing
concentrated cannabis. Such actions are a clear circumvention to the legislature’s recent passing of AB158 which
makes possession of one ounce or less of marijuana by a juvenile a citable offense. *See* Nev. Legis. AB 158 Reg.
Sess. 2021.

25 In another, when looking in the context of prohibitions against possession of firearms, NRS 202.360 “[prohibits any
26 person to] have in his or her possession or under his or her custody or control any firearm if the person is an
unlawful user of, or addicted to, any controlled substance.” Again, because marijuana is classified as a Schedule I
27 substance, an individual who is addicted to marijuana would be prohibited from possessing a firearm.

²² Scott McKenna, *Medical Marijuana Laws in the Silver State*, 6 Nevada Lawyer, Aug. 10, 2002.

1. The legislature shall provide by law for:

(a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.

(b) Restriction of the medical use of the plant by a minor to require diagnosis and written authorization by a physician, parental consent, and parental control of the acquisition and use of the plant.

(c) Protection of the plant and property related to its use from forfeiture except upon conviction or plea of guilty or nolo contendere for possession or use not authorized by or pursuant to this section.

(d) A registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential.

(e) Authorization of appropriate methods for supply of the plant to patients authorized to use it.²³

25. The Nevada Legislature followed this constitutional mandate by passing Assembly Bill 453.

26. In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*, which legalized possession of marijuana for recreational purposes.²⁴

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²³ Nevada Const. art. IV, § 38.

²⁴ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014), <https://www.nvsos.gov/sos/home/showdocument?id=3294>.

1 27. The initiative intended to “better focus state and local law enforcement resources
2 on crimes involving violence and personal property” rather than prosecuting marijuana offenses.²⁵

3 28. The *Initiative* explicitly stated that it intended for marijuana to be “regulated in a
4 manner similar to alcohol.”²⁶

5 29. Additionally, with its passage, the *Initiative to Regulate and Tax*
6 *Marijuana* authorized the Nevada Department of Taxation, rather than the Nevada Board of
7 Pharmacy, to regulate cannabis in the community.²⁷

8
9 30. In 2019, the Nevada state legislature transferred authority to regulate marijuana
10 from the Department of Taxation to a newly created Cannabis Compliance Board.²⁸

11 31. Despite the passage of the *Nevada Medical Marijuana Act* and the *Initiative to*
12 *Regulate and Tax Marijuana*, the Nevada State Board of Pharmacy continues to exert control over
13 regulating marijuana, cannabis, and cannabis derivatives and has continued to classify them as
14 Schedule I substances in direct contradiction of Article 4, Section 38, of the Nevada Constitution
15 and in violation of NRS 453.166.

16 CLAIMS FOR RELIEF

17 **I. WRIT OF MANDAMUS**

18 32. Here, there is no plain, speedy and adequate remedy in the ordinary course of law.
19 There is no other method to challenge the Board’s misclassification of marijuana, cannabis, and
20 cannabis derivatives as Schedule I substances.
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24 _____
²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* See also NRS 453D.200.

²⁸ Nev. Legis. AB 533 Reg. Sess. 2019 (“Sections 2–187 of this bill generally . . . transfer the authority to license and regulate persons and establishments involved in the marijuana industry in this State to the Cannabis Compliance Board created by section 54 of this bill.”). However, the Cannabis Compliance Board is directly appointed by the Governor and, like the Department of Taxation, not under the authority of the Board of Pharmacy. *Id.*

1 33. Regulations passed by the Board, including the scheduling of substances as
2 Schedule I, cannot violate the Nevada Constitution.

3 34. Additionally, the Nevada Legislature has conferred a duty upon the Board to follow
4 NRS 453.166 when classifying substances as Schedule I substances.

5 35. Under NRS 453.166, the Board may only designate a substance as a Schedule I
6 substance if it determines that the substance “has high potential for abuse *and* has no accepted
7 medical use in treatment in the United States or lacks accepted safety for use in treatment under
8 medical supervision.” (emphasis added).
9

10 36. The Board is mandated to review the schedule annually and maintain a list of
11 current schedules.²⁹

12 37. Given the mandate that the Board review the schedule annually, its failure to
13 remove marijuana, cannabis, and cannabis derivatives as Schedule I substances year after year is
14 an affirmation that they satisfy both requirements under NRS 453.166.
15

16 38. However, such a conclusion is erroneous given that in 1998, Nevada categorical
17 recognized marijuana as having medical use in treatment under Article 4, Section 38 of the Nevada
18 Constitution.³⁰

19 39. Because the Board’s misclassification of marijuana, cannabis, and cannabis
20 derivatives is in direct contradiction with Article 4, Section 38 of the Nevada Constitution, the
21 misclassification is unconstitutional and must be declared invalid.
22

23 40. In the alternative, if the Board agrees with the findings in Article 4, Section 38 of
24 the Nevada Constitution, the Board’s decision to classify marijuana, cannabis, and cannabis
25

26 ²⁹ NRS 453. 211 (1)(a): “The Board shall review the schedule annually and maintain a list of current schedules.”

27 ³⁰ Section 38 not only recognizes that marijuana has accepted medical use in treatment, but it also explicitly lists disorders marijuana must be available to treat.

1 derivatives as Schedule I substances violates NRS 453.166 because it must find that marijuana,
2 cannabis, and cannabis derivatives have “no accepted medical use in treatment or lacks accepted
3 safety for use in treatment under medical supervision” before they are placed on the list of Schedule
4 I substances, and the findings under Article 4, Section 38 cannot meet that standard.

5 41. The clash between Nevada’s explicit recognition of marijuana as acceptable use in
6 medical treatment, which is enshrined in the Nevada Constitution, and the Board’s classification
7 of marijuana, cannabis, and cannabis derivatives as Schedule I substances due to them having no
8 accepted medical use in treatment presents an important question of first impression that arises
9 with some frequency, and thus favors consideration of the petition.

11 42. A substance is not considered a controlled substance unless the Board has been
12 delegated the authority to classify the substance by the Nevada legislature.³¹

13 43. The Board’s authority to classify marijuana, cannabis, and cannabis derivatives was
14 stripped with the passage of the *Initiative to Regulate and Tax Marijuana* in two distinct ways.

15 44. First, the *Initiative* promulgated that marijuana should be “regulated in a manner
16 similar to alcohol.”³² Under NRS 453.2186, the Board is prohibited from scheduling, and has no
17 authority, to regulate “distilled spirits, wine, [and] malt beverages.”

18 45. Because the *Initiative* expressly stated that marijuana should be treated the same as
19 alcohol, and the Legislature specifically prohibited the Board from scheduling alcohol, it should
20 follow that the Board is also prohibited from scheduling marijuana, cannabis, and cannabis
21 derivatives.
22

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24 ///

26 ³¹ See *Miller v. Jacobson*, 104 Nev. 600, 763 P.2d 356, 358-359 (1988) (finding that State could not prosecute a
27 defendant for possessing a substance that was improperly scheduled by the Board as a controlled substance).

³² *Id.*

1 46. Second, the *Initiative* made clear that the Nevada Department of Taxation, rather
2 than the Nevada Board of Pharmacy, has the authority to regulate cannabis in the community.³³

3 47. The Legislature later confirmed this when it transferred authority to regulate
4 marijuana from the Department of Taxation to the Cannabis Compliance Board.³⁴

5 48. By its own admission on its website, the Board states, “The Board of Pharmacy has
6 no jurisdiction over the medical use of marijuana.”³⁵

7 49. Therefore, the Board exceeded its authority when it placed, or failed to remove,
8 marijuana, cannabis, and cannabis derivatives on its list as Schedule I substances and NAC
9 453.510 (4), (9), and (10) must be amended to reflect this change.
10

11 II. DECLARATORY JUDGMENT

12 50. Alternatively,³⁶ under the Nevada Uniform Declaratory Judgments Act, NRS
13 30.010 to 30.160, this Court has the power to declare the rights, status and other legal relations of
14 the parties whether or not further relief is or could be claimed, and a declaration may be either
15 affirmative or negative in form and effect, and such declarations have the force and effect of a final
16 judgment or decree.³⁷

17
18 51. More specifically, with respect to contracts, statutes, and other writings, NRS
19 30.040(1) provides:

20 Any person interested under a deed, written contract
21 or other writings constituting a contract, or whose
22 rights, status, or other legal relations are affected by
23 statute, municipal ordinance, contract or franchise,
may have determined any question of construction or
validity arising under the instrument, statute,

24 ³³ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
25 <https://www.nvsos.gov/sos/home/showdocument?id=3294>. See also NRS 453D.200.

³⁴ Nev. Legis. AB 533 Reg. Sess. 2019.

26 ³⁵ “Frequently Asked Questions,” Nevada State Board of Pharmacy, The Official State of Nevada Website, accessed
February 23, 2022, https://bop.nv.gov/resources/FAQ/Practice_FAQ/.

³⁶ See NRCP 8(a)(3).

27 ³⁷ See NRS 30.030.

1 ordinance, contract or franchise and obtain a
2 declaration of rights, status or other legal relations
thereunder.

3 52. The provisions of the Act are to be liberally construed and administered, and are
4 intended to be remedial, in order to settle and to afford relief from uncertainty and insecurity with
5 respect to rights, status and other legal relations.³⁸

6 53. Such declarations have the force and effect of a final judgment or decree.³⁹

7 54. This matter satisfies the four elements that must be met for declaratory relief to be
8 granted, as described below.⁴⁰

9 55. The facts stated above herein reveal a justiciable controversy in which a claim of
10 right is asserted against one who has an interest in contesting it.

11 56. The controversy is between persons whose interests are adverse.

12 57. CEIC has a legally protectable interest in the controversy.

13 58. Antoine Poole has a legally protectable interest in the controversy.

14 59. The issue involved in the controversy is ripe for determination as individuals
15 continue to be prosecuted for violating Nevada statutes which rely on the scheduling of marijuana,
16 cannabis, and cannabis derivatives as Schedule I substances, and CEIC must continue to expend
17 resources remedying such actions.

18 60. Thus, CEIC seeks an order declaring its rights with respect to removal of marijuana,
19 cannabis, and cannabis derivatives as schedule I substances.

20 61. For the sake of brevity, Petitioners hereby incorporate paragraphs 33 - 49, above,
21 as if fully set forth herein.

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26 ³⁸ See NRS 30.140.

³⁹ NRS 30.030.

27 ⁴⁰ *Kress v. Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948).

1 62. As such, Petitioners are requesting that this Court resolve the discrepancies between
2 Article 4, Section 38, of the Nevada Constitution, NRS 453.166, and NAC 453.510 by declaring
3 that: 1) the classification of marijuana, cannabis, and cannabis derivatives as Schedule I substances
4 violates Article 4, Section 38, of the Nevada Constitution or in the alternative the classification of
5 marijuana, cannabis, and cannabis derivatives as Schedule I substances violates NRS 453.166; 2)
6 the Nevada State Board of Pharmacy acted outside of its authority when it classified, or failed to
7 remove, marijuana, cannabis, and cannabis derivatives; and 3) the Nevada State Board of
8 Pharmacy must remove marijuana, cannabis, and cannabis derivatives as Schedule I substances
9 under NAC 453.510 (4), (9), and (10).
10

11 **III. INJUNCTIVE RELIEF**

12 63. Injunctive relief is a historical equitable remedy that has been codified in Nevada
13 law at NRS 33.010.

14 64. CEIC does not have an adequate remedy at law.

15 65. Antoine Poole does not have an adequate remedy at law.

16 66. NRS 33.010 states that an injunction may be granted:
17

18 1. When it shall appear by the complaint that the
19 plaintiff is entitled to the relief demanded, and such
20 relief or any part thereof consists in restraining the
21 commission or continuance of the act complained of,
22 either for a limited period or perpetually.

23 2. When it shall appear by the complaint or
24 affidavit that the commission or continuance of some
25 act, during the litigation, would produce great or
26 irreparable injury to the plaintiff.

27 3. When it shall appear, during the litigation, that
the defendant is doing or threatens, or is about to do,
or is procuring or suffering to be done, some act in
violation of the plaintiff's rights respecting the subject

1 of the action, and tending to render the judgment
2 ineffectual.

3 64. As discussed above, CEIC and Mr. Poole are entitled to relief regarding the
4 misclassification of marijuana, cannabis, and cannabis derivatives as Schedule I substances.

5 65. Failing to require the Nevada Board of Pharmacy to remove marijuana, cannabis,
6 and cannabis derivatives as Schedule I substances under NAC 453.510 (4), (9), and (10) will cause
7 irreparable injury to Petitioners because CEIC must continue to expend its resources on preventing
8 and/or remedying such efforts, and Mr. Poole continues to suffer the consequences of a cannabis-
9 related conviction.

10
11 66. Petitioners request injunctive relief, preventing the Board from classifying
12 marijuana, cannabis, and cannabis derivatives as Schedule I substances.

13 **REQUEST FOR RELIEF**

14 WHEREFORE, Petitioners, CEIC and Antoine Poole, ask for the following relief:

15 A. A Writ of Mandamus ordering that 1) the classification of marijuana, cannabis, and
16 cannabis derivatives as Schedule I substances violates Article 4, Section 38, of the Nevada
17 Constitution or, in the alternative, the classification of marijuana, cannabis, and cannabis
18 derivatives as Schedule I substances violates NRS 453.166; 2) the Nevada Board of
19 Pharmacy acted outside of its authority when it classified, or failed to remove, marijuana,
20 cannabis and cannabis derivatives; and 3) mandating that the Nevada Board of Pharmacy
21 remove language designating marijuana, cannabis, and cannabis derivatives as Schedule I
22 substances under NAC 453.510 including: 1) "Marijuana" under Section 4; 2) Section 9
23 in its entirety which states "[u]nless specifically listed in another schedule,
24 Tetrahydrocannabinols natural or synthetic equivalents of substances contained in the
25 plant, or in the resinous extractives of Cannabis, sp. or synthetic substances, derivatives,
26
27

1 and their isomers with similar chemical structure and pharmacological activity such as the
2 following: Delta 9 cis or trans tetrahydrocannabinol, and their optical isomers, also known
3 as Delta 1 cis or trans tetrahydrocannabinol, and their optical isomers; Delta 8 cis or trans
4 tetrahydrocannabinol, and their optical isomers, also known as Delta 6 cis or trans
5 tetrahydrocannabinol, and their optical isomers; Delta 3, 4 cis or trans
6 tetrahydrocannabinol, and its optical isomers; Tetrahydrocannabinols contained in the
7 genus Cannabis or in the resinous extractives of the genus Cannabis; Synthetic equivalents
8 of tetrahydrocannabinol substances or synthetic substances, derivatives and their isomers
9 with a similar chemical structure; and since nomenclature of these substances is not
10 internationally standardized, compounds of these structures, regardless of numerical
11 designation of atomic positions covered)”; and 3) Section 10 in its entirety which states
12 “[u]nless specifically listed in another schedule, any material, compound, mixture or
13 preparation which contains any quantity of CBD (natural or synthetic equivalents of the
14 substances contained in the plant or in the resinous extractives of Cannabis sp. or synthetic
15 substances, derivatives and their isomers with similar chemical structure and
16 pharmacological activity)”.

17
18
19 B. All equitable declaratory relief and/or statutory declaratory relief that arises from
20 or is implied by the facts, whether or not specifically requested, including but not limited
21 to a declaration that: 1) the Petitioners/Plaintiffs are entitled to writ/injunctive relief; 2) the
22 classification of marijuana, cannabis, and cannabis derivatives as Schedule I substances
23 violates Article 4, Section 38, of the Nevada Constitution or, in the alternative, the
24 classification of marijuana, cannabis, and cannabis derivatives as Schedule I substances
25 violates NRS 453.166; 3) the Nevada Board of Pharmacy acted outside of its authority
26
27

1 when it classified marijuana, cannabis, and cannabis derivatives; and 4) the Nevada Board
2 of Pharmacy must remove marijuana, cannabis, and cannabis derivatives as Schedule I
3 substances under NAC 453.510 (4), (9), and (10);

4 C. All equitable injunctive relief that arises from or is implied by the facts, whether or
5 not specifically requested, including an injunction preventing the Nevada State Board of
6 Pharmacy from classifying marijuana, cannabis, and cannabis derivatives as Schedule I
7 substances;

8
9 D. Award Petitioners their reasonable attorney's fees and costs incurred in this action
10 as provided by NRS 18.010; and

11 E. Such other and further relief as the court deems just and equitable.

12 Dated this 15th day of April, 2022.

This document does **not** contain the
Social Security number of any
person.
Pursuant to NRS 53.045, I declare
under penalty of perjury that the
foregoing is true and correct.

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**



SADMIRA RAMIC, ESQ.

Nevada Bar No. 15984

CHRISTOPHER M. PETERSON,
ESQ.

Nevada Bar No. 13932

SOPHIA A. ROMERO, ESQ.

Nevada Bar No.: 12446

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Las Vegas, NV 89106

Telephone: (702) 366-1226

Facsimile: (702) 366-1331

Email: ramic@aclunv.org

Attorneys for Petitioners/Plaintiffs

EXHIBIT 1

1 **DECL**
 2 SADMIRA RAMIC, ESQ.
 Nevada Bar No.: 15984
 3 CHRISTOPHER M. PETERSON, ESQ.
 Nevada Bar No.: 13932
 4 SOPHIA A. ROMERO, ESQ.
 Nevada Bar No.: 12446
 5 **AMERICAN CIVIL LIBERTIES**
UNION OF NEVADA
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 Las Vegas, NV 89106
 7 Telephone: (702) 366-1226
 Facsimile: (702) 830-9205
 8 Email: ramic@aclunv.org
 9 *Attorneys for Petitioners/Plaintiffs*

10 **EIGHTH JUDICIAL DISTRICT COURT**
 11 **CLARK COUNTY, NEVADA**

12 CANNABIS EQUITY AND INCLUSION
 13 COMMUNITY (CEIC), a domestic nonprofit
 corporation; ANTOINE POOLE, an individual,
 14
 15 **Petitioners/Plaintiffs,**

Case No.:
 Department:

16 vs.

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

19 **Respondent/Defendant.**

20 **DECLARATION OF A'ESHA GOINS IN SUPPORT OF PETITION FOR WRIT OF**
 21 **MANDAMUS TO COMPEL THE NEVADA STATE BOARD OF PHARMACY TO**
 22 **REMOVE CANNABIS AND OTHER CANNABIS DERIVATIVES FROM NEVADA**
ADMINISTRATIVE CODE § 453.510 AS SCHEDULE I SUBSTANCES AND
 23 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

24 I, A'Esha Goins, under penalty of perjury declare:

- 25 1. I am over the age of 18 and I am competent to testify.
 26 2. I have personal knowledge of the facts set forth in this declaration.

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3. I make this declaration in support of the Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief.
4. I am the Founder and Executive Director of Cannabis Equity and Inclusion Community (CEIC).
5. CEIC provides support to individuals from underrepresented communities as they apply for licenses to participate in the legal cannabis market.
6. CEIC is a membership organization with approximately seventy members across the state.
7. At least one member of CEIC has been convicted under the Nevada Revised Statutes of a cannabis-related offense after the legalization of medical marijuana in Nevada.
8. CEIC has held record sealing workshops bi-annually to assist individuals with prior cannabis-related criminal convictions in applying for pardons and sealing criminal records.
9. CEIC continues to conduct community outreach to identify individuals in need of assistance to deal with consequences resulting from cannabis-related criminal convictions.

I declare under penalty of perjury that the foregoing is true and correct.

Dated April 14, 2022

DocuSigned by:
A' Esha Allums Goins
03FB694885DF4B8...

A'Esha Allums-Goins

EXHIBIT 2

1 **DECL**
 2 SADMIRA RAMIC, ESQ.
 Nevada Bar No.: 15984
 3 CHRISTOPHER M. PETERSON, ESQ.
 Nevada Bar No.: 13932
 4 SOPHIA A. ROMERO, ESQ.
 Nevada Bar No.: 12446
 5 **AMERICAN CIVIL LIBERTIES**
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 9 *Attorneys for Petitioners/Plaintiffs*

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 11 **CLARK COUNTY, NEVADA**

12 CANNABIS EQUITY AND INCLUSION
 13 COMMUNITY (CEIC), a domestic nonprofit
 corporation; ANTOINE POOLE, an individual,
 14
 15 **Petitioners/Plaintiffs,**

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16 vs.

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

19 **Respondent/Defendant.**

20 **DECLARATION OF ANTOINE POOLE IN SUPPORT OF PETITION FOR WRIT OF**
 21 **MANDAMUS TO COMPEL THE NEVADA STATE BOARD OF PHARMACY TO**
 22 **REMOVE CANNABIS AND OTHER CANNABIS DERIVATIVES FROM NEVADA**
ADMINISTRATIVE CODE § 453.510 AS SCHEDULE I SUBSTANCES AND
 23 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

24 I, Antoine Poole, under penalty of perjury declare:

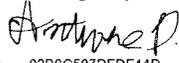
- 25 1. I am over the age of 18 and I am competent to testify.
 26 2. I have personal knowledge of the facts set forth in this declaration.

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- 3. I make this declaration in support of the Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief.
- 4. I am, and was at all times relevant hereto, a resident of the State of Nevada, County of Clark, City of Las Vegas.
- 5. I was adjudicated guilty in the Eighth Judicial District Court of the State of Nevada of Possession of Controlled Substance, a Category E Felony pursuant to NRS 453.336, for possession of marijuana on April 20, 2017.
- 6. As a result of this conviction, I have suffered collateral consequences including hardship in obtaining employment.

I declare under penalty of perjury that the foregoing is true and correct.

Dated April 14, 2022

DocuSigned by:

02B0C507DFDF44D...

Antoine Poole

1 **IAFD**

2 SADMIRA RAMIC, ESQ.

3 Nevada Bar No.: 15984

4 CHRISTOPHER M. PETERSON, ESQ.

5 Nevada Bar No.: 13932

6 SOPHIA A. ROMERO, ESQ.

7 Nevada Bar No.: 12446

8 **AMERICAN CIVIL LIBERTIES**

9 **UNION OF NEVADA**

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14 Email: ramic@aclunv.org

15 *Attorneys for Petitioners/Plaintiffs*

16 **EIGHTH JUDICIAL DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 CANNABIS EQUITY AND INCLUSION
19 COMMUNITY (CEIC), a domestic nonprofit
20 corporation; ANTOINE POOLE, an individual,

21 *Petitioners/Plaintiffs,*

22 vs.

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

26 *Respondent/Defendant.*

Case No.:

Dept. No.:

**INITIAL APPEARANCE FEE
DISCLOSURE
(NRS CHAPTER 19)**

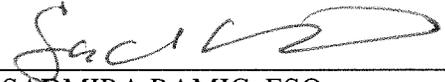
27 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for
28 parties appearing in the above-entitled action as indicated below:

29 Cannabis Equity and Inclusion Community (CEIC) \$270.00

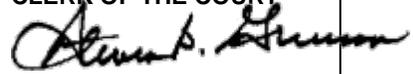
30 Antoine Poole \$30.00

31 TOTAL REMITTED: \$300.00

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2 DATED this 15th Day of April, 20 22
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6 SADMIRA RAMIC, ESQ
7 Nevada Bar No. 15984
8 SOPHIA A. ROMERO, ESQ
9 Nevada Bar No. 12446
10 CHRISTOPHER M. PETERSON, ESQ.
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1 ANSB

2 BRETT KANDT (Bar No. 5384)

3 General Counsel

4 bkandt@pharmacy.nv.gov

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6 Assistant General Counsel

7 p.keegan@pharmacy.nv.gov

8 Nevada State Board of Pharmacy

9 985 Damonte Ranch Parkway – Suite 206

10 Reno, NV 89521

11 775.850.1440 – Telephone

12 *Attorneys for Respondent/Defendant*

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**DISTRICT COURT OF
CLARK COUNTY, NEVADA**

CANNABIS EQUITY AND INCLUSION
COMMUNITY (CEIC), a domestic
nonprofit corporation; ANTOINE POOLE,
an individual,

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

**RESPONDENT/DEFENDANT'S ANSWER TO PETITIONERS/PLAINTIFFS'
PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant General Counsel, hereby submits this Answer to Petitioners/Plaintiffs’ Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This Answer is based upon the following points and authorities and the papers and pleadings on file herein.

1 passage of Assembly Bill No. 453 in the 2001 Legislative Session, codified as NRS Chapter
2 453A. *The Initiative to Regulate and Tax Marijuana*, enacted in 2016 and codified as NRS
3 Chapter 453D, subsequently authorized the regulation and taxation of marijuana for adult
4 recreational use under limited circumstances and subject to significant restrictions.⁷

5 By passage of Assembly Bill No. 533 in the 2019 Legislative Session, NRS Chapters
6 453A and 453D were repealed and replaced in their entirety by Title 56 of the Nevada
7 Revised Statutes. Certain acts falling within the narrow confines of either NRS Chapter
8 678C (Medical Use of Cannabis) or NRS Chapter 678D (Adult Use of Cannabis) are exempt
9 from State prosecution; otherwise, all other activities involving marijuana remain illegal
10 under Nevada law.

11 **II. LEGAL STANDARD**

12 **A. Writ of Mandamus**

13 Mandamus under NRS Chapter 34 is an extraordinary remedy to compel the
14 performance of an act that the law requires as a duty resulting from an office, trust or
15 station, or to control a manifest abuse or arbitrary or capricious exercise of discretion. *State*
16 *v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). The burden is upon
17 the petitioner to demonstrate that a writ of mandamus is warranted. *American Home*
18 *Assurance Co. v. Dist. Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Mandamus
19 will not lie “when the duty imposed requires deliberation and decision upon facts
20 presented.” *Douglas Cty. Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669,
21 671 (1962).

22 **B. Declaratory Relief**

23 Declaratory relief under NRS Chapter 30 requires a justiciable controversy between
24 persons whose interests are adverse, where the party seeking declaratory relief has a
25 legally protectable interest in the controversy and the issue involved is ripe for judicial
26 determination. *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). An action for
27

28 ⁷ 2016 initiative petition, Ballot Question No. 2.

1 declaratory relief is appropriate when a party merely seeks a ruling on the meaning of a
2 statute, but not to resolve an issue that has been committed for decision to an
3 administrative body. *See Prudential Ins. Co. v. Ins. Comm'r*, 82 Nev. 1, 5, 409 P.2d 248,
4 250 (1966)). Furthermore:

5 [A] judicially-fashioned ‘procedural short-cut,’ combining traditional
6 declaratory judgment and mandamus proceedings, is based squarely on the
7 premise that once the constitutional violation is established (declaratory
8 judgment), the remedy therefor (mandamus) is both self-evident and
9 exclusive.

8 *Tam v. Colton*, 94 Nev. 452, 460, 581 P.2d 447, 452 (1978).

9 C. Injunctive Relief

10 “It is axiomatic that a court cannot provide a remedy unless it has found a
11 wrong. ‘The existence of a right violated is a prerequisite to the granting of an injunction.’”
12 *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993)
13 (citing 43 C.J.S. § 18 *Injunctions* (1978)). Moreover, permanent injunctive relief under
14 NRS 33.010 and NRCP 65 must meet the following criteria:

15 Broadly speaking, an injunction may issue to restrain a wrongful act that
16 gives rise to a cause of action. Permanent injunctive relief may only be
17 granted if there is no adequate remedy at law, a balancing of equities favors
18 the moving party, and success on the merits is demonstrated.

18 *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 824-25, 265 P.3d
19 680, 684 (2011) (citing *State Farm, supra.*).

20 III. ARGUMENT

21 Plaintiffs’ core arguments are that listing marijuana in Schedule I violates Nev.
22 Const. art. 4, § 38 and/or NRS 453.166(2), and that the Board no longer has any authority
23 to schedule marijuana as a controlled substance. Both the premise and the conclusion of
24 these arguments are wrong. Furthermore, the relief Plaintiffs seek will not redress their
25 alleged injuries.

1 **A. Listing marijuana in Schedule I does not conflict with Nev. Const. art.**
2 **4, § 38 or NRS 453.166(2).**

3 **1. Marijuana meets the criteria for Schedule I.**

4 Plaintiffs do not allege that they have been prevented from using marijuana on the
5 advice of a physician in conformance with Nev. Const. art. 4, § 38 and NRS Chapter 678C.
6 Rather, they mistakenly equate the right of a patient to use marijuana “upon the advice of
7 a physician” to marijuana having “accepted medical use in treatment in the United States”
8 in order to fabricate a legal conflict. Petition at 11:16-12:10 (¶¶ 38-41). They do so in a
9 bid to have criminal convictions for unlawful acts falling outside the scope of NRS Chapter
10 678C or 678D overturned.

11 However, the constitutional right to use marijuana “upon the advice of a physician”
12 in Nevada does not establish that marijuana has “accepted medical use in treatment in the
13 United States” thereby precluding its continued designation in Schedule I. Undoubtedly a
14 patient “is fully entitled to rely upon the physician's professional skill and judgment while
15 under his care.” *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Plaintiffs do
16 not allege, and cannot demonstrate, that the current listing of marijuana in Schedule I
17 interferes with the doctor-patient relationship. *See Conant v. Walters*, 309 F.3d 629 (9th
18 Cir. 2002) (distinguishing the ability of doctors in states with medical marijuana laws to
19 “recommend” rather than “prescribe” marijuana in potential violation of the CSA).

20 Nevertheless, marijuana has “no accepted medical use in treatment in the United
21 States” based upon the scientific perspective of marijuana on the national level. All states
22 recognize marijuana’s designation as a Schedule I controlled substance under federal law,
23 even as 37 states and the District of Columbia now permit its medical use.⁸

24
25 ⁸ Alabama Code Chapter 20 Article 2A; Alaska Stat. 17.37.10, et seq.; Arizona Rev.
26 Statutes 36-2801, et seq.; Arkansas Const. of 1874: Amendment 98, § 1, et seq.; California
27 Health and Safety Code: § 11362.5, et seq.; Colorado Const. art. XVIII, § 14; Connecticut
28 Gen. Statutes: Title 21A, § 21a-408, et seq.; Delaware Code: Title 16, § 4901A, et seq.; D.C.
Code Ann. 7-1671.01, et seq.; Florida Statutes: Title XXIX, § 381.986, et seq.; Hawaii Rev.
Statutes: § 329-121, et seq.; Illinois Statutes: Chapter 410, § 130/1, et seq.; Louisiana Rev.
Statutes: Title 40, § 1046, et seq.; Maine Rev. Statutes: Title 22, § 2421, et seq.; Code of

1 Over the years, petitions have been submitted to the U.S. Drug Enforcement
2 Administration (“DEA”) to reschedule marijuana. Most recently, in August 2016, after a
3 five-year medical and scientific evaluation by the U.S. Food and Drug Administration
4 (“FDA”), the DEA rejected two petitions—one submitted by two state governors and the
5 other submitted by a health care provider—to reschedule marijuana under the CSA. See
6 DENIAL OF PETITION TO INITIATE PROCEEDINGS TO RESCHEDULE MARIJUANA, 81 Fed. Reg.
7 53687 (DEA 2016)⁹ and DENIAL OF PETITION TO INITIATE PROCEEDINGS TO RESCHEDULE
8 MARIJUANA, 81 Fed. Reg. 53767 (DEA 2016).¹⁰ Consistent with past practice, the denials
9 were based on the conclusion of the U.S. Department of Health and Human Services that
10 marijuana continues to meet the statutory criteria for inclusion on Schedule I, specifically:

11 (2) *Marijuana has no currently accepted medical use in treatment in the United*
12 *States.* Based on the established five-part test for making such determination,
13 marijuana has no “currently accepted medical use” because: As detailed in the
14 HHS evaluation, the drug's chemistry is not known and reproducible; there
15 are no adequate safety studies; there are no adequate and well-controlled
16 studies proving efficacy; the drug is not accepted by qualified experts; and the
17 scientific evidence is not widely available.

18 The denials included the FDA’s 78-page medical and scientific evaluation entitled “Basis
19 for the Recommendation for Maintaining Marijuana in Schedule I of the Controlled
20 Substances Act.”

21 Maryland Regulations: Chapter 10, § 62.01, et seq.; Code of Massachusetts
22 Regulations: 105 CMR 725.001, et seq.; Michigan Compiled Laws: Chapter 333, § 26421, et
23 seq.; Minnesota Statutes §§152.22-152.37; Mississippi Medical Cannabis Act, SB 2095
24 (2022); Missouri Const. article XIV; Montana Code Annotated: Title 50, § 46-301, et seq.;
25 New Hampshire Rev. Statutes: Title X, Chapter 126-X.; New Jersey Statutes: Title 24, §
26 6I-1, et seq.; New Mexico Statutes: Chapter 26, § 2B-1, et seq.; New York Consolidated
27 Laws: PBH § 3360, et seq.; North Dakota Century Code: Title 19, § 24.1-01, et seq.; Ohio
28 Rev. Code: Title XXXVII, § 3796.01, et seq.; 63 Oklahoma Statutes Supp.2019, §§ 427.1--
427.23; Oregon Rev. Statutes: Section 475B.400.; 35 Pennsylvania Cons. Stat. Chapter 64;
Rhode Island General Laws: Title 21, Chapter 28.6-1, et seq.; South Dakota Codified Laws
Chapter 34-20G; Utah Code 26-61a; Vermont Statutes: Title 18, § 4471, et seq.; Code of
Virginia §§54.1-3442.5-3442.8; Washington Rev. Code: Title 69, Section 51A.005, et seq.;
W.Va. Code Chapter 16A.

⁹ <https://www.govinfo.gov/content/pkg/FR-2016-08-12/pdf/2016-17954.pdf>.

¹⁰ <https://www.govinfo.gov/content/pkg/FR-2016-08-12/pdf/2016-17960.pdf>.

1 The FDA's five-part test for determining whether a drug has "currently accepted
2 medical use in treatment in the United States" has withstood legal challenge. *All. for*
3 *Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994). The DEA's continued
4 designation of marijuana in Schedule I after more than half of the states' enactment of
5 medical marijuana laws has withstood legal challenge. *Ams. for Safe Access v. DEA*, 706
6 F.3d 438, 449-52 (D.C. Cir. 2013). The U.S. Supreme Court has expressly rejected the
7 notion that use of a Schedule I drug can be medically necessary under the CSA,
8 notwithstanding that it has "no currently accepted medical use." *United States v. Oakland*
9 *Cannabis Buyers' Coop.*, 532 U.S. 483, 493 (2001).

10 Marijuana's lack of accepted medical use in treatment on the national level is further
11 demonstrated by a 2017 report from the National Academies of Sciences, Engineering, and
12 Medicine, which concluded in pertinent part:

13 Despite the extensive changes in policy at the state level and the rapid rise in
14 the use of cannabis both for medical purposes and for recreational use,
15 conclusive evidence regarding the short- and long-term health effects (harms
16 and benefits) of cannabis use remains elusive. A lack of scientific research
has resulted in a lack of information on the health implications of cannabis
use, which is a significant public health concern

17 National Academies of Sciences, Engineering, and Medicine, THE HEALTH EFFECTS OF
18 CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS
19 FOR RESEARCH, Washington, DC; National Academies Press, at page 2.¹¹

20 As further evidence of marijuana's lack of accepted medical use in treatment in the
21 United States, the American Medical Association has adopted a policy stating in pertinent
22 part:

23 Our AMA: (1) believes that scientifically valid and well-controlled clinical
24 trials conducted under federal investigational new drug applications are
25 necessary to assess the safety and effectiveness of all new drugs, including
26 potential cannabis products for medical use; (2) believes that cannabis for
medicinal use should not be legalized through the state legislative, ballot
initiative, or referendum process;

27
28 ¹¹ Available at <https://nap.nationalacademies.org/read/24625/chapter/1>.

1 American Medical Association Policy D-95.969, CANNABIS LEGALIZATION FOR MEDICINAL
2 USE (March 1, 2019).¹² Finally, the American Psychiatric Association has adopted a
3 position statement declaring in pertinent part: “[p]olicy and practice surrounding
4 cannabis-derived substances should not be altered until sufficient clinical evidence
5 supports such changes” and further stating “[m]edical treatment should be evidence-based
6 and determined by professional standards of care; it should not be authorized by ballot
7 initiatives.” American Psychiatric Association, POSITION STATEMENT IN OPPOSITION TO
8 CANNABIS AS MEDICINE (July 2019).¹³

9 Plaintiffs’ contention that enactment of the *Nevada Medical Marijuana Initiative* by
10 and of itself establishes that marijuana has an “accepted medical use in treatment in the
11 United States” that disqualifies it as a Schedule I substance is simply wrong. They have
12 contrived a conflict where none exists, since the Board must consider scientific and medical
13 evidence, *not* popular opinion, when evaluating a substance. *See* NRS 453.146(2).¹⁴ The
14 scheduling of marijuana must be viewed *not* from a sociological, ideological or political
15 viewpoint, but from a scientific one.

16 **2. Nothing in the express language of either ballot initiative**
17 **compels the deletion of marijuana from NAC 453.510.**

18 Although the proponents of either ballot initiative could have squarely addressed
19 the deletion of marijuana as a Schedule I controlled substance, both initiatives are silent

21 ¹² Available at
22 <https://policysearch.amaassn.org/policyfinder/detail/cannabis?uri=%2FAMADoc%2Fdirectives.xml-D-95.969.xml>.

23 ¹³ Available at <https://www.psychiatry.org/File%20Library/AboutAPA/Organization-Documents-Policies/Policies/Position-Cannabis-as-Medicine.pdf>.

24 ¹⁴ Certain drugs containing cannabinoids that have been approved by the U.S. Food
25 and Drug Administration have been descheduled by the Board and are no longer controlled
26 substances. *See* LCB File No. R090-21, 12-29-2020. Additionally, one form of dronabinol,
27 a synthetic cannabinoid approved by the U.S. Food and Drug Administration, has been
28 listed in Schedule II (*see* LCB File No. R153-99, 3-1-2000), and another form of dronabinol
listed in Schedule III (*see* LCB File No. R001-19, 10-30-2019).

1 on the subject. To the contrary, both initiatives are framed to account for and distinguish
2 between the lawful and unlawful use of marijuana.

3 Subsection 2(a) of the *Nevada Medical Marijuana Initiative* states that Section 38
4 does not “[a]uthorize the use or possession of the [cannabis] plant for a purpose other than
5 medical or use for a medical purpose in public.” The implementing legislation subsequently
6 delineated lawful acts that are exempt from State prosecution and other acts that are not
7 exempt.¹⁵ Those provisions together with certain affirmative defenses are now codified at
8 NRS 678C.200, NRS 678C.210, NRS 678C.300 and NRS 678C.310.

9 Section 4 of the *Initiative to Regulate and Tax Marijuana* specified that the Act does
10 “not permit any person to engage in” and does “not prevent the imposition of any civil,
11 criminal, or other penalty” for certain enumerated acts.¹⁶ Sections 6-8 of the Act delineated
12 the lawful acts that are exempt from State prosecution.¹⁷ Those acts that are exempt from
13 State prosecution are now specified in NRS 678D.200, while certain acts that are not
14 exempt from prosecution and other prohibited acts are specified in NRS 678D.300 and
15 678D.310.

16 An exemption from State prosecution allows a person to avoid prosecution in State
17 courts for an act that *otherwise constitutes a criminal offense*. Courts have consistently
18 recognized this distinction specifically in the context of marijuana legislation. *See Oakland*
19 *Cannabis*, 532 U.S. at 502 (2001) (Steven, J., concurring); *Wilson v. Lynch*, 835 F.3d 1083,
20 1088 (9th Cir. 2016); *United States v. Pickard*, 100 F.Supp.3d 981, 1010 (E.D. Cal. 2015);
21 *Doe v. State ex rel. Legislature of the 77th Session of Nev.*, 133 Nev. 763, 763-64, 406 P.3d
22 482, 483 (2017); *City of Missoula v. Shumway*, 434 P.3d 918, 921 (Mont. 2019). The ballot
23 initiatives did not totally legalize or decriminalize marijuana. Any person who engages in
24 marijuana-related activity outside the narrow scope of NRS Chapters 678C or 678D is
25

26 ¹⁵ See former NRS 453A.200, NRS 453.210 and NRS 453.300.

27 ¹⁶ See former NRS 453D.100.

28 ¹⁷ See former NRS 453D.110-.130, *inclusive*.

1 engaging in criminal conduct and subject to potential State prosecution. Plaintiffs’ failure
2 to accept this distinction is fatal to their Petition.

3 **3. The Nevada Legislature has not taken any action to delete**
4 **marijuana from Schedule I.**

5 In the intervening twenty-two years since enactment of Nev. Const. art. 4, § 38, the
6 Legislature has never deemed the deletion of marijuana from the list of Schedule I
7 controlled substances necessary to carrying out the constitutional mandate that marijuana
8 be authorized for a patient’s medical use “upon the advice of a physician.” Section 35 of
9 Assembly Bill No. 453 in the 2001 Legislative Session (codified as NRS 453.005) originally
10 stated “[t]he provisions of this chapter do not apply to the extent that they are inconsistent
11 with the provisions of chapter 453A of NRS.” NRS 453.005 was then amended by Section
12 214 of Assembly Bill No. 533 in the 2019 Legislative Session to state: “[t]he provisions of
13 this chapter do not apply to the extent that they are inconsistent with the provisions of title
14 56 of NRS.” However, neither bill, nor any of the other intervening legislation that
15 significantly amended NRS Chapter 453A, altered the scheduling of marijuana or repealed
16 the criminal offenses specific to marijuana.¹⁸ Nor has any other intervening legislation
17 that amended the criminal penalties related to marijuana.¹⁹

18 It is reasonable to conclude that the continued scheduling of marijuana in NAC
19 453.510 is consistent with legislative intent. “[A]cquiescence by the legislature . . . may be
20 inferred from its silence during a period of years.” *Oliver v. Spitz*, 76 Nev. 5, 9, 348 P.2d
21 158, 160 (1960), cited with approval in *Imperial Palace, Inc. v. State, Dept. of Taxation*, 108
22 Nev. 1060, 1068, 843 P.2d 813, 818 (1992). Plaintiffs are asking the Court to disrupt the
23 existing statutory scheme. “Courts should avoid hypertechnical constructions that

24 ¹⁸ See Assembly Bill No. 130 (2003 Nev. Leg. Session); Assembly Bill No. 519 (2005
25 Nev. Leg. Session); Assembly Bill No. 538 (2009 Nev. Leg. Session); Senate Bill No. 374
26 (2013 Nev. Leg. Session); Senate Bill No. 447 (2015 Nev. Leg. Session); Assembly Bill No.
27 422 (2017 Nev. Leg. Session); Senate Bill No. 487 (2017 Nev. Leg. Session).

28 ¹⁹ See Assembly Bill No. 236 (2019 Nev. Leg. Session); Assembly Bill No. 158 (2021
Nev. Leg. Session); Assembly Bill No. 393 (2021 Nev. Leg. Session); Senate Bill No. 359
(2021 Nev. Leg. Session).

1 frustrate legislative intent.” *Heath v. Kiger*, 176 P.3d 690, 693 (Ariz. 2008) (citations
2 omitted). Their wish should not be granted.

3 **B. The Initiative to Regulate and Tax Marijuana did not divest the**
4 **Board of jurisdiction over the scheduling of marijuana.**

5 Plaintiffs’ ultimate policy-centric goal, to deschedule marijuana entirely, is revealed
6 in their argument that with the subsequent passage of the *Initiative to Regulate and Tax*
7 *Marijuana* the Board was effectively divested of any jurisdiction over marijuana. Petition
8 at 10:11-15 (¶31); 12:13-13:10 (¶¶43-49). Once again, Plaintiffs do not allege that they have
9 been prevented from engaging in recreational use of marijuana in conformance with NRS
10 Chapter 678D. Their endgame is clear: that marijuana no longer be regulated as a
11 controlled substance under Nevada law, even in Schedule II, III, IV or V.²⁰

12 First, Plaintiffs conflate the precatory language in Section 2 of the *Initiative to*
13 *Regulate and Tax Marijuana* stating that “marijuana should be regulated in a manner
14 similar to alcohol” with NRS 453.2186(1)’s prohibition on scheduling distilled spirits, wine,
15 malt beverages or tobacco to argue that with the initiative’s passage, descheduling
16 marijuana was a *fait accompli*. Petition at 12:16-23 (¶¶ 44-45). This construal makes a
17 quantum leap of logic. Such an interpretation would render Sections 4 and 6-8 of the ballot
18 initiative meaningless and impermissibly thwart the will of the electorate. *See Torvinen v.*
19 *Rollins*, 93 Nev. 92, 94, 560 P.2d 915, 917 (1977); *see also City of Reno v. Bldg. & Constr.*
20 *Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011) (“this court will not
21 read statutory language in a manner that produces absurd or unreasonable results.”).
22 Under the current statutory scheme set forth in NRS Chapter 678D, to the extent
23
24

25
26 ²⁰ See NRS 453.176 (Schedule II tests); NRS 453.186 (Schedule III tests); NRS
27 453.196 (Schedule IV tests); NRS 453.206 (Schedule V tests) – a substance with accepted
28 medical use in treatment in the United States is still subject to listing in one of these
schedules based upon the potential for abuse and resulting physical or psychological
dependence.

1 marijuana was authorized for adult recreation use by the *Initiative to Regulate and Tax*
2 *Marijuana*, it is “regulated in a manner similar to alcohol” consistent with Section 2.²¹

3 Plaintiffs next assert that since the *Initiative to Regulate and Tax Marijuana* placed
4 regulatory authority for the Act with the Nevada Department of Taxation (subsequently
5 transferred to the Cannabis Compliance Board by Assembly Bill No. 533 in the 2019
6 Legislative Session), this abrogated the Board’s authority to schedule marijuana under
7 NRS Chapter 453. Petition at 13:1-4 (¶¶46-47). They are essentially arguing that the
8 continued scheduling of marijuana is *ultra vires*. See *Coury v. Robison*, 115 Nev. 84, 88,
9 976 P.2d 518, 520 (1999); *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208,
10 467 P.2d 96, 97 (1970). Plaintiffs vastly oversimplify what is a comprehensive,
11 multilayered statutory scheme in which several governmental entities occupy different
12 roles and exercise their respective levels of regulatory oversight of marijuana in a manner
13 that neither overlaps nor conflicts.

14 The Nevada Division of Public and Behavioral Health, *not* the Cannabis Compliance
15 Board, is responsible for the issuance of registry identification cards and letters of approval
16 authorizing the medical use of marijuana. See NRS 678C.220-.270, *inclusive*. The Nevada
17 Department of Taxation retains authority over the taxation of marijuana. See NRS
18 372A.200-.300, *inclusive*; see also NRS 678B.640 (determination of fair market wholesale
19 value). The Nevada Department of Agriculture retains authority over the use of pesticides
20 in the cultivation of marijuana. See NRS 586.550. Local governments are responsible for
21 adopting and enforcing local cannabis control measures pertaining to zoning and land use
22 for adult-use cannabis establishments. See NRS 678D.510(1)(d). The Board retains
23 jurisdiction over the scheduling of marijuana as a controlled substance, while marijuana-
24 related criminal offenses remain within the purview of law enforcement agencies.

25 In the course of implementing and amending that statutory scheme the Legislature

26
27 ²¹ The tiered licensing and regulatory structure in Title 56 is comparable to the tiered
28 licensing and regulatory structure in NRS Chapter 369 (Intoxicating Liquor; Licenses and Taxes).

1 has never deemed it necessary to deschedule marijuana or divest the Board of its authority
2 to schedule marijuana. NRS Chapter 453 still governs the unlawful possession, trafficking
3 or production of marijuana, with measured carve-outs for the legitimate activities
4 originally authorized by the ballot initiatives and now codified in Title 56. “[W]henever
5 possible, a court will interpret a rule or statute in harmony with other rules or statutes.”
6 *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (citations omitted).
7 Furthermore, to the extent Plaintiffs believe that the current statutory scheme does not
8 regulate marijuana in a manner sufficiently “similar” to alcohol, their complaint (and any
9 remedy) lies with the Legislature, not with the Board.²²

10 **C. Plaintiffs may petition the Board pursuant to NAC 639.140 to review**
11 **the scheduling of marijuana.**

12 Mandamus is not appropriate insofar as Plaintiffs may petition pursuant to NAC
13 639.140 to have the current listing of marijuana in Schedule I reviewed by the Board. *See,*
14 *e.g., Cty. of Washoe v. Reno*, 77 Nev. 152, 155-56, 360 P.2d 602, 603-04 (1961) (“the fact that
15 mandamus would give an easier or more expeditious remedy is not the criterion.”).
16 Plaintiffs must pursue this administrative remedy before seeking judicial relief.²³
17 “Ordinarily, before availing oneself of district court relief from an agency decision, one must
18 first exhaust available administrative remedies.” *Malecon Tobacco, Ltd. Liab. Co. v. State*
19 *ex rel. Dep’t of Taxation*, 118 Nev. 837, 839-41, 59 P.3d 474, 475-76 (2002) (citations
20 omitted); *see also Benson v. State Engineer*, 131 Nev. 772, 779, 358 P.3d 221, 226 (2015)
21 (administrative proceedings are not futile solely because the statute prevents the petitioner
22 from receiving his or her ideal remedy).

23
24 ²² Plaintiffs mistakenly represent that the unlawful sale of alcohol carries only a
25 \$250 fine under NRS 364.150. (Petition at 8:8-9 (¶22 n.21). Depending on the exact
26 activity, this may constitute a category D felony under NRS 369.495 or a misdemeanor
27 under NRS 369.490 and NRS 369.550.

28 ²³ Plaintiffs’ reliance on *State Bd. of Parole Comm’rs v. Second Judicial Dist. Court*,
451 P.3d 73 (Nev. 2019) is misplaced. (Opp. To Mot. To Dismiss at 18:3-19:5). The review
of scientific and medical evidence pursuant to NRS 453.146 does not require the Board to
answer a legal question.

1 NRS 453.2182 mandates that, in the absence of any objection, the Board *shall*
2 designate a substance consistent with federal law without making the findings required by
3 NRS 453.166. Granted, marijuana was designated in Schedule I by the Legislature prior
4 to the enactment of NRS 453.2182, and the Board may deviate from federal law when
5 scheduling, rescheduling or deleting a controlled substance *if* it makes the determinations
6 required under NRS 453.146. However, it is important to note that NRS 453.146(3)
7 provides that the Board may consider findings of the FDA or the DEA “as prima facie
8 evidence relating to one or more of the determinative factors.” Whether this alone justifies
9 the continued listing of marijuana in Schedule I is a decision left to the Board.

10 In the intervening twenty-two years since the enactment of Nev. Const. art. 4, § 38
11 the Board has regularly reviewed and amended the list of Schedule I substances in NAC
12 453.510 in conformance with NRS 453.211. Never in that time have Plaintiffs – or *any*
13 party – objected to the listing of marijuana in Schedule I or otherwise petitioned the Board
14 pursuant to NAC 639.140 for reconsideration of the scheduling of marijuana in light of the
15 amendment to the Nevada Constitution. This refutes the notion that Plaintiffs have no
16 plain, speedy, and adequate remedy at law and calls into question their inexcusable delay
17 in seeking redress. Plaintiffs now seek to circumvent this statutory administrative
18 rulemaking process altogether and have the Court make scientific determinations that are
19 legislatively delegated to the Board. *See Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-
20 54, 697 P.2d 107, 110 (1985).

21 **D. Granting Plaintiffs their requested relief will not redress their**
22 **alleged injuries.**

23 Plaintiffs request a writ or order directing the Board to remove marijuana from NAC
24 453.510 and divesting the Board of any further authority to schedule marijuana. Petition
25 at 2:1-4; 13:8-10 (¶49); 14:20-21 (¶60); 15:1-10 (¶62); 16-18 (¶¶A and B). In reality,
26 Plaintiffs seek to decriminalize conduct clearly proscribed by the Uniform Controlled
27 Substances Act, a proposition rejected by the Nevada Supreme Court in *Luqman*. 101 Nev.
28 at 157, 697 P.2d at 112-13. Even so, this will not redress their alleged injuries.

1 Plaintiffs allege that “individuals continue to be prosecuted for violating Nevada
2 statutes which rely on the scheduling of marijuana, cannabis and cannabis derivatives as
3 Schedule I substances.” Petition at 14:16-18 (¶59). Aside from Plaintiff Poole, the Petition
4 fails to cite the specific crimes for which these unnamed individuals were convicted.

5 However, most of the relevant criminal offenses expressly reference “marijuana” and
6 do not even rely upon marijuana being scheduled as a controlled substance.²⁴ NRS 453.339
7 prohibits the trafficking of “marijuana” specifically.²⁵ NRS 453.3393 prohibits the unlawful
8 production of “marijuana” specifically.²⁶ NRS 453.336(4) prohibits the unlawful possession
9 of 1 ounce or less of “marijuana” specifically, while subsection (5) prohibits the unlawful
10 possession of more than 1 ounce, but less than 50 pounds, of “marijuana” or more than one-
11 eighth of an ounce, but less than one pound, of “concentrated cannabis.” NRS 453.401(3)
12 imposes a penalty for conspiracy to unlawfully possess more than 1 ounce of “marijuana”
13 specifically. NRS 484C.110(4) prohibits operating a vehicle under the influence of
14 “marijuana” specifically. NRS 212.160(3) prohibits the possession by a State prisoner of “a
15 controlled substance without lawful authorization or marijuana or marijuana
16 paraphernalia, regardless of whether the person holds a valid registry identification
17 card.”²⁷ These criminal offenses will remain on the books and enforceable even if marijuana
18 is no longer scheduled as a controlled substance. Persons previously convicted of these
19

20 ²⁴ Conversely, several of the crimes enumerated in NRS Chapter 453 expressly
21 exclude marijuana. *See* NRS 453.322; NRS 453.3325; NRS 453.3353.

22 ²⁵ NRS 453.339(1) states in pertinent part: “a person who knowingly or intentionally
23 sells, manufactures, delivers or brings into this State or who is knowingly or intentionally
24 in actual or constructive possession of *marijuana* or *concentrated cannabis* shall be
25 punished” (Emphasis added).

26 ²⁶ NRS 453.3393(1) states in pertinent part: “A person shall not knowingly or
27 intentionally manufacture, grow, plant, cultivate, harvest, dry, propagate or process
28 *marijuana*, except as specifically authorized by the provisions of this chapter or chapter
453A of NRS.” (Emphasis added).

²⁷ Note that the statute distinguishes between an inmate’s possession of a controlled
substance pursuant to a valid prescription (lawful), and possession of marijuana with a
valid registry identification card (unlawful).

1 offenses will gain no benefit from the relief requested.

2 The Petition conveniently omits any reference to these criminal offenses, only citing
3 to NRS 453.336(1), NRS 453.337 and NRS 202.360. (Petition at 8:8-9 (¶22 n.21)). NRS
4 453.336(1) and (2) prohibit the unlawful possession of any controlled substance, but these
5 subsections have largely been supplanted by subsections (4) and (5) for possession of
6 marijuana. NRS 202.360 prohibits the possession of a firearm by a person who “unlawfully”
7 uses any controlled substance, but the prohibition does not apply to a person “lawfully”
8 using marijuana in conformance with NRS Chapters 678C or 678D. NRS 453.337 prohibits
9 the unlawful possession for the purpose of sale of any controlled substance classified in
10 Schedule I or II, but the unlawful possession of marijuana for the purpose of sale was
11 clearly proscribed under both ballot initiatives and reflected in all subsequent legislation.²⁸

12 Plaintiff Poole’s alleged injury, that he was convicted of marijuana possession in
13 violation of NRS 453.336(1) and (2) after the enactment of Nev. Const. art. 4, § 38 (Petition
14 at 4:1-6 (¶1); 6:1-4 (¶10), can only be redressed by a judicial ruling that enactment of the
15 *Nevada Medical Marijuana Initiative* actually descheduled marijuana as a controlled
16 substance altogether.²⁹ A ruling to this effect will not even fully redress the alleged injuries
17 of the unidentified CEIC members with convictions for offenses specific to marijuana.
18 Moreover, the alleged injuries to CEIC’s members are impermissibly generalized and any
19 redressability to CEIC or its members by way of its requested relief remains speculative.
20 *See, e.g., Laborers' Int'l Union of N. Am., Local 169 v. Douglas Cty.*, 454 P.3d 1259, 2019
21 Nev. Unpub. LEXIS 1374 at *2 (Nev. Dec. 19, 2016) (“speculative interests are not legally
22

23 ²⁸ Subsection 1(e) of the *Nevada Medical Marijuana Initiative* states: “The
24 legislature shall provide by law for . . . [a]uthorization of appropriate methods for supply
25 of the plant to patients authorized to use it. Section 2 of the *Initiative to Regulate and Tax
26 Marijuana* states: “Marijuana may only be purchased from a business that is licensed by
27 the State of Nevada.”

28 ²⁹ Poole was arrested for possession of a controlled substance in violation of NRS
453.336 on May 20, 2016 (*see* criminal information filed in case no. C-16-319916-1), *prior*
to enactment of the *Initiative to Regulate and Tax Marijuana*; his subsequent conviction
after enactment of that ballot initiative is moot.

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ORDER

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

CANNABIS EQUITY AND INCLUSION
COMMUNITY (CEIC), a domestic nonprofit
corporation; ANTOINE POOLE, an individual,

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W
Dept No.: XV

**JUDGMENT AND ORDER GRANTING PETITION FOR WRIT OF MANDAMUS
AND REQUEST FOR DECLARATORY RELIEF**

This matter having come before this court on September 14, 2022, on Petitioners/Plaintiffs' Petition for Writ of Mandamus and Request for Declaratory Relief; Christopher M. Peterson, Esq., and Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, appearing on behalf of Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (CEIC) and Antoine Poole (collectively "Petitioners"); Brett Kandt, Esq. and Peter K. Keegan, Esq., appearing on behalf of the State of Nevada *ex rel.* Board of Pharmacy ("Board" or "Respondent"); the Court having reviewed the papers and pleadings on file herein, having heard the arguments of counsel, upon agreement of counsel that this matter is ready to be decided upon the pleadings without trial, and with good cause appearing, the Court hereby finds, concludes, and orders as follows:

This ruling is limited to the Petition and Complaint in front of the Court and only addresses the issues of (1) whether the scheduling of cannabis as a Schedule I substance is in conflict with the Article 4, Section 38 of the Constitution of the State of Nevada; (2) whether cannabis must be removed from the listing of Schedule I substances; and (3) whether, in light of the enactment of NRS Title 56, the Board of Pharmacy has any authority to schedule cannabis as a controlled substance.

APP0045

1 The parties agreed and stipulated that the issues raised may be decided as a matter of law by
2 the Court. The first two issues were adjudicated at the time of hearing, this Court reserved ruling on
3 the third issue upon submission of competing orders. To the extent the briefing addressed any
4 additional issues, the Court declines to rule and this Order shall constitute a final judgment.

5 **FINDINGS OF FACT**

6 Plaintiff CEIC is, and was at all times relevant herein, a domestic nonprofit corporation
7 organized and existing under and by virtue of the laws of the State of Nevada. Based upon its
8 uncontroverted declaration, CEIC advocates for freedom, equity, and opportunity in Nevada’s
9 cannabis market by supporting people from underrepresented communities as they apply for licenses
10 to participate in the legal cannabis market. CEIC has also dedicated resources to mitigating
11 Nevada’s long history of prosecuting cannabis-related offenses by assisting individuals with prior
12 cannabis-related criminal convictions in applying for pardons and sealing criminal records. CEIC
13 continues to engage in community outreach to identify these individuals and organize record sealing
14 workshops.

15 Plaintiff Antoine Poole is, and was at all times relevant herein, a resident of the State of
16 Nevada, County of Clark, City of Las Vegas. Based upon his uncontroverted declaration, Mr. Poole
17 was adjudicated guilty in the Eighth Judicial District Court of the State of Nevada of Possession of
18 Controlled Substance, a Category E Felony pursuant to NRS 453.336, for possession of marijuana.
19 This adjudication occurred on April 20, 2017, after cannabis was legalized for both medical and
20 recreational use in Nevada.

21 Respondent/Defendant, Nevada State Board of Pharmacy, is a public entity of the State of
22 Nevada with the power to sue and be sued, pursuant to NRS 12.105 and NRS 41.031.

23 The transactions and occurrences that give rise to the Petitioners’ claims against Respondent,
24 the Nevada State Board of Pharmacy, occurred in the City of Las Vegas, Clark County, Nevada.

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1 In 1923, the Nevada Legislature banned marijuana,¹ making even simple possession,
2 regardless of purpose, a criminal offense.² When the Legislature enacted the Uniform Controlled
3 Substances Act in 1971, marijuana was classified as a Schedule I substance.³ In 1981, the Nevada
4 Legislature delegated to the Nevada Board of Pharmacy authority to designate, by regulation and
5 within limits prescribed by the Legislature, what substances would be listed on Nevada’s schedules
6 of controlled substances.⁴ Since then the Board categorized, and still categorizes, marijuana,
7 cannabis, and cannabis derivatives as Schedule I substances under NAC 453.510. By classifying
8 marijuana, cannabis, and cannabis derivatives as Schedule I substances, the Board denies that
9 marijuana has “accepted medical use in treatment in the United States.”

10 The Board’s authority to categorize a substance as Schedule I is limited by the conjunctive
11 test set forth in NRS 453.166, which states:

12 The Board shall place a substance in schedule I if it finds that the
13 substance:

- 14 1. Has high potential for abuse; *and*
- 15 2. Has no accepted medical use in treatment in the United
16 States or lacks accepted safety for use in treatment under medical
17 supervision.

18
19 ¹ “Marijuana” and “cannabis” are used interchangeably and have the same meaning. NRS 453.096
20 defines marijuana as: “(a) All parts of any plant of the genus *Cannabis*, whether growing or not; (b)
21 The seeds thereof; (c) The resin extracted from any part of the plant; and (d) Every compound,
22 manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.” NRS 678A.085,
under Chapter 678A- Administration of Laws Related to Cannabis, states that cannabis has the
meaning ascribed to the term “marijuana” in [NRS 453.096](#).

23 ²An Act to Regulate the Use, Supply and Possession of Narcotic Drugs in the State of Nevada, and
24 to Provide Penalties for the Violation Thereof, Nev. Compiled Laws §§ 5084-5085 (1929) (repealed
1937).

25 ³See Section 31 of Assembly Bill No. 107 (1971 Nev. Leg. Session).

26 ⁴See 1981 Nev. Stats. ch. 402 §§ 1-39 at 734-750; *see also Miller v. Jacobson*, 104 Nev. 600, 602,
27 763 P.2d 356, 357 (1988); *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110
28 (1985)

1 (Emphasis added). Several Nevada Revised Statutes reference the classifications designated by the
2 Board to criminalize activities related to controlled substances.⁵

3 In 1998, Nevada voted on and passed the *Nevada Medical Marijuana Act*, a ballot initiative
4 intended to amend the Nevada Constitution to legalize marijuana for medical use in Nevada.⁶
5 Successful passage of the *Nevada Medical Marijuana Act* resulted in the addition of Article 4,
6 Section 38, of the Nevada Constitution, which states:

7
8 1. The legislature shall provide by law for:

9 (a) The use by a patient, upon the advice of his physician, of a
10 plant of the genus *Cannabis* for the treatment or alleviation of
11 cancer, glaucoma, acquired immunodeficiency syndrome;
12 severe, persistent nausea of cachexia resulting from these or other
13 chronic or debilitating medical conditions; epilepsy and other

14
15 ⁵ For example, NRS 453.337 makes it unlawful to possess for sale any amount of a Schedule I
16 substance. Penalties for violating NRS 453.337 are based on whether the offender is a subsequent
17 offender, with the first offense being a Category D felony. Because marijuana is classified as a
18 Schedule I substance, it is a Class D felony to possess *any* amount of marijuana for sale. To put this
19 into perspective, if an individual sells even a tenth of a gram of marijuana without a license, they
20 would be charged with a Class D felony for their first offense and even steeper penalties for any
21 subsequent sales. This is a dramatic departure from marijuana being treated like alcohol given that
22 an individual selling any amount of alcohol without a license is simply fined for selling alcohol
23 without a license. *See* NRS 364.150.

24 As another example, NRS 453.336 criminalizes possession of a controlled substance not for purpose
25 of sale. It states, “[a] person who violates this section shall be punished for the first or second
26 offense, if the controlled substance is listed in schedule I, II, III or IV, for a category E felony as
27 provided in NRS 193.130.” Because marijuana was not legalized for individuals under 21 years of
28 age and it is classified as a Schedule I substance, NRS 453.336 is being used to charge juveniles and
persons under 21 years old with felony offenses for possessing concentrated cannabis. Such actions
are a clear circumvention to the legislature’s recent passing of AB158 which makes possession of
one ounce or less of marijuana by a juvenile a citable offense. *See* Nev. Legis. AB 158 Reg. Sess.
2021.

29 In another, when looking in the context of prohibitions against possession of firearms, NRS 202.360
30 “[prohibits any person to] have in his or her possession or under his or her custody or control any
31 firearm if the person is an unlawful user of, or addicted to, any controlled substance.” Again,
32 because marijuana is classified as a Schedule I substance, an individual who is addicted to marijuana
33 would be prohibited from possessing a firearm.

34 ⁶ Scott McKenna, *Medical Marijuana Laws in the Silver State*, 6 Nevada Lawyer, Aug. 10, 2002.

1 disorders characterized by seizure; multiple sclerosis and other
2 disorders characterized by muscular spasticity; or other
conditions approved pursuant to law for such treatment.

3 (b) Restriction of the medical use of the plant by a minor to
4 require diagnosis and written authorization by a physician,
5 parental consent, and parental control of the acquisition and use
of the plant.

6 (c) Protection of the plant and property related to its use from
7 forfeiture except upon conviction or plea of guilty or nolo
8 contendere for possession or use not authorized by or pursuant to
this section.

9 (d) A registry of patients, and their attendants, who are
10 authorized to use the plant for a medical purpose, to which law
enforcement officers may resort to verify a claim of authorization
and which is otherwise confidential.

11 (e) Authorization of appropriate methods for supply of the plant
12 to patients authorized to use it.⁷

13 The Nevada Legislature followed this constitutional mandate by passing Assembly Bill 453 (2001).

14 In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*, which
15 legalized possession of marijuana for recreational purposes.⁸ The initiative intended to “better focus
16 state and local law enforcement resources on crimes involving violence and personal property”
17 rather than prosecuting marijuana offenses.⁹ The *Initiative* explicitly stated that it intended for
18 marijuana to be “regulated in a manner similar to alcohol.”¹⁰ In addition to legalizing the use of
19 cannabis for recreational purposes, the *Initiative* prescribed the regulatory regime that would oversee
20 the market for both recreational and medical cannabis, naming the Nevada Department of Taxation
21 as the prime regulatory agency.

22
23 _____
24 ⁷ Nevada Const. art. IV, § 38.

25 ⁸ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
26 <https://www.nvsos.gov/sos/home/showdocument?id=3294>.

27 ⁹ *Id.*

28 ¹⁰ *Id.*

1 In 2019, the Nevada Legislature passed NRS Title 56, titled “Regulation of Cannabis”, to
2 codify and clarify the *Initiative*. In four chapters, NRS Chapters 678A-D, the Legislature created a
3 comprehensive regulatory regime for the new cannabis industry, tasking the Cannabis Compliance
4 Board with heading the regime while explicitly authorizing specific Nevada state agencies and
5 subdivisions to regulate all aspects of the cannabis industry. The Nevada State Board of Pharmacy
6 was not referenced in any capacity nor explicitly authorized to participate in the regulatory regimes
7 prescribed by the *Initiative* or NRS Title 56.

8 Pursuant to the Petition, Petitioners/Plaintiffs requested that this Court resolve the
9 discrepancies between Article 4, Section 38, of the Nevada Constitution, NRS 453.166, and NAC
10 453.510 by declaring that: (1) the classification of marijuana, cannabis, and cannabis derivatives as
11 Schedule I substances violates Article 4, Section 38, of the Nevada Constitution or in the alternative
12 the classification of marijuana, cannabis, and cannabis derivatives as Schedule I substances violates
13 NRS 453.166; (2) the Nevada State Board of Pharmacy acted outside of its authority when it
14 classified, or failed to remove, marijuana, cannabis, and cannabis derivatives; and (3) the Nevada
15 State Board of Pharmacy must remove marijuana, cannabis, and cannabis derivatives as Schedule I
16 substances under NAC 453.510(4), NAC 453.510(9), and NAC 453.510(10).

17 **CONCLUSIONS OF LAW REGARDING IMMEDIATE RULING**

18 As the transactions and occurrences that give rise to the Petitioners’ claims against
19 Respondent, the Nevada State Board of Pharmacy, occurred in the City of Las Vegas, Clark County,
20 Nevada, and the Respondents operate and/or reside in Clark County, this Court has the authority to
21 grant the writ relief requested herein pursuant to NRS 34.160. Additionally, this Court has original
22 subject matter jurisdiction over this request for declaratory and injunctive relief under Article 6,
23 Section 6, of The Constitution of the State of Nevada.¹¹ Venue is proper in this Court pursuant to
24 NRS 13.020 and 13.040 because the cause, or some part thereof, arose in the City of Las Vegas,
25 Clark County, Nevada.

26
27 _____
28 ¹¹ See also NRS 30.030 (Uniform Declaratory Judgments Act).

1 Writ relief is an extraordinary remedy, and therefore, it is within a court’s sound discretion
2 whether to grant such relief.¹² “Extraordinary writ relief may be available where there is no ‘plain,
3 speedy and adequate remedy in the ordinary course of law.’”¹³ However, even when a legal remedy
4 is available, the court can “still entertain a petition for writ ‘relief where the circumstances reveal
5 urgency and strong necessity.’”¹⁴ A writ of mandamus may be issued by the court “to compel the
6 performance of an act which the law especially enjoins as a duty resulting from an office, trust or
7 station; or to compel the admission of a party to the use and enjoyment of a right or office to which
8 the party is entitled and from which the party is unlawfully precluded by such inferior tribunal,
9 corporation, board or person,” when there is no plain, speedy, and adequate remedy in the ordinary
10 course.¹⁵ The court must examine each request for writ relief individually.¹⁶ The court will generally
11 exercise its discretion to consider an extraordinary writ where an important legal issue that needs
12 clarification is raised or to promote judicial economy and administration.¹⁷ When a petition for
13 extraordinary relief involves a question of first impression that arises with some frequency, the
14 interests of sound judicial economy and administration favor consideration of the petition.¹⁸

16 ¹² *Segovia v. Eighth Judicial Dist. Court*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017).

17 ¹³ *Id.*, quoting NRS 34.170 and NRS 34.330).

18 ¹⁴ *Id.*, quoting *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104, 111, 979 P.2d 216, 220
19 (1999)).

20 ¹⁵ “The writ may be issued by ... a district court or a judge of the district court, to compel the
21 performance of an act which the law especially enjoins as a duty resulting from an office, trust or
22 station; or to compel the admission of a party to the use and enjoyment of a right or office to which
23 the party is entitled and from which the party is unlawfully precluded by such inferior tribunal,
corporation, board or person. When issued by a district court or a judge of the district court it shall
be made returnable before the district court.” NRS 34.160; NRS 34.170.

24 ¹⁶ *Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

25 ¹⁷ *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392
26 P.3d 170, 172 (2017).

27 ¹⁸ *A.J. v. Eighth Judicial District Court in and for County of Clark*, 2017, 394 P.3d 1209, 133 Nev.
28 202, [quoting](#) *Cote H. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 124 Nev. 36, 175 P.3d 906 (2008).

1 Under the Nevada Uniform Declaratory Judgments Act, NRS 30.010 to 30.160, this Court
2 has the power to declare the rights, status, and other legal relations of the parties whether or not
3 further relief is or could be claimed, and a declaration may be either affirmative or negative in form
4 and effect, and such declarations have the force and effect of a final judgment or decree.¹⁹ More
5 specifically, with respect to contracts, statutes, and other writings, NRS 30.040(1) provides:

6 Any person interested under a deed, written contract or other
7 writings constituting a contract, or whose rights, status, or other
8 legal relations are affected by statute, municipal ordinance,
9 contract or franchise, may have determined any question of
10 construction or validity arising under the instrument, statute,
11 ordinance, contract or franchise and obtain a declaration of rights,
12 status or other legal relations thereunder.

13 The provisions of the Act are to be liberally construed and administered, and are intended to be
14 remedial, in order to settle and to afford relief from uncertainty and insecurity with respect to rights,
15 status and other legal relations.²⁰ Such declarations have the force and effect of a final judgment or
16 decree.²¹ This matter satisfies the four elements that must be met for declaratory relief to be granted,
17 as described below.²² The facts stated above herein reveal a justiciable controversy in which a claim
18 of right is asserted against one who has an interest in contesting it. The controversy is between
19 persons whose interests are adverse. The issue involved in the controversy is ripe for determination
20 as individuals continue to be prosecuted for violating Nevada statutes which rely on the scheduling
21 of marijuana, cannabis, and cannabis derivatives as Schedule I substances, and CEIC must continue
22 to expend resources remedying such actions.

23 Because there is no requirement that Petitioners/Plaintiffs exhaust any administrative
24 remedies directly with the Board of Pharmacy, and in light of the holding in *State Bd. Of Parole*

25 ¹⁹ See NRS 30.030.

26 ²⁰ See NRS 30.140.

27 ²¹ NRS 30.030.

28 ²² *Kress v. Corey*, 65 Nev. 1, 25–26, 189 P.2d 352, 364 (1948).

1 *Comm’rs v. Second Judicial Dist. Court*,²³ a Writ of Mandamus and Complaint for Declaratory
2 Relief are appropriate vehicles for seeking redress in this matter.

3 This Court has subject matter jurisdiction, pursuant to NRS 34.160 and Article 6, Section 6
4 of the Nevada Constitution, to determine the legal questions at hand, specifically whether (1) the
5 Constitution of the State of Nevada, Article 4, Section 38, and NRS 143.166 precludes the Board of
6 Pharmacy from scheduling cannabis, as defined by NRS 453.096 pursuant to NRS 678A.085, as a
7 Schedule I substance and (2) after the passage of the *Initiative to Regulate and Tax Marijuana* and
8 the subsequent enactment of NRS Title 56 by the Nevada State Legislature, the Nevada State Board
9 of Pharmacy retained its authority to regulate cannabis.

10 *I. Standing*

11 A petitioner has standing in a proceeding on an extraordinary writ when the petitioner has a
12 “beneficial interest” in obtaining writ relief. “[A] beneficial interest sufficient to pursue a
13 mandamus action” is a “substantial interest that falls within the zone of interests to be protected by
14 the legal duty asserted.”²⁴ In other words, the writ of mandamus must be denied if the petitioner will
15 gain no direct benefit from its issuance and suffer no direct detriment if it is denied.²⁵

16 CEIC has organizational standing in this matter because (1) its organizational mission was
17 frustrated and (2) it had to divert resources to combat the particular injurious behavior in question.²⁶
18 If the writ of mandamus is denied, CEIC will continue to suffer these detriments, and if it is granted,
19 it will gain a direct benefit. Furthermore, CEIC has associational standing in this matter because (1)

20 _____
21 ²³451 P.3d 73, at 76 (2019) (“But the Pardons Board cannot answer the legal question presented in
22 this matter, as that is a matter for the courts.”)

23 ²⁴ *Id.* at 460-61 (citing *Lindelli v. Town of San Anselmo*, 111 Cal.App.4th 1099, 4 Cal.Rptr.3d 453,
461 (2003)).

24 ²⁵ *Id.* (citing *Waste Management v. County of Alameda*, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740,
25 747 (2000)).

26 ²⁶ “An organization may satisfy the [Article III](#) requirement of injury in fact if it can demonstrate: (1)
27 frustration of its organizational mission; and (2) diversion of its resources to combat the particular
28 housing discrimination in question.” *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th
Cir. 2004).

1 its members would otherwise have standing to sue in their own right; (2) the interests it seeks to
2 protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief
3 requested requires the participation of individual members in the lawsuit.²⁷ Finally, because the
4 issues before the Court question whether an executive branch agency engaged in regulatory
5 rulemaking outside of the authority granted to the agency pursuant to the Nevada Constitution and
6 statute, the issues are fundamentally about separation-of-powers between the branches of Nevada’s
7 government,²⁸ and CEIC has standing pursuant to the public-importance doctrine as described in
8 *Nev. Pol’y Rsch Inst., Inc., v. Cannizarro*, 507 P.3d 1203 (2022).

9 Antoine Poole, a Nevada resident who has been convicted under the Nevada Revised Statutes
10 of a controlled substance-related offense after the legalization of cannabis in Nevada and who
11 continues to experience collateral consequences because of his conviction, has a direct and
12 substantial interest in obtaining writ relief in this matter.

13 Plaintiffs have standing in this matter as set forth in this Court’s order dated July 26, 2022,
14 which is based upon the uncontroverted declarations of the Plaintiffs.

15 *II. Article 4, Section 38 of the Constitution of the State of Nevada*

16 This Court has a duty not to create law or policy but rather to interpret the law including the
17 constitutionality of statutes, statutory schemes, and regulations. Additionally, this Court is beholden
18 to the laws of the State of Nevada, especially those set forth in the Constitution of the State of
19 Nevada. Here Petitioners/Plaintiffs have no plain, speedy and adequate remedy in the ordinary
20 course of law, and there is no other legal method to challenge the Board’s misclassification of

21
22 ²⁷ “[W]e have recognized that an association has standing to bring suit on behalf of its members
23 when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it
24 seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the
25 relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington*
State Apple Advertising Comm’n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *Greater*
Birmingham Ministries v. Sec’y of State for State of Alabama, 992 F.3d 1299, 1316 (11th Cir. 2021).

26 ²⁸ *See Roberts v. State*, 104 Nev. 33, 36-40 (1988) (finding that agency regulation invalidated due to
27 falling outside the agency’s authority violated the separation-of-powers doctrine); *West Virginia v.*
28 *EPA*, 142 S. Ct. 2587, 2609 (2022) (finding that invalid EPA regulation implicated separation-of-
powers doctrine).

1 marijuana, cannabis, and cannabis derivatives as Schedule I substances. Thus, relief pursuant to a
2 writ of mandamus is appropriate.

3 Article 4, Section 38 of the Nevada Constitution, “Use of Plant of genus Cannabis for
4 medical purposes,” specifically refers to the use of cannabis by a patient, upon the advice of a
5 physician, for the treatment or alleviation of various medical conditions, recognizing under Nevada
6 law that there is an accepted use of cannabis for medical treatment.

7 Regulations passed by the Board of Pharmacy, including the designation of substances as
8 Schedule I pursuant to the agency’s rulemaking authority, cannot violate the Nevada Constitution.
9 The Nevada Legislature, through NRS 453.211(1)(a), has conferred a duty upon the Board of
10 Pharmacy to follow NRS 453.166 when classifying substances as Schedule I substances. Under NRS
11 453.166, the Board of Pharmacy may only designate a substance as a Schedule I substance if it
12 determines that the substance “has high potential for abuse *and* has no accepted medical use in
13 treatment in the United States or lacks accepted safety for use in treatment under medical
14 supervision.” (Emphasis added). The Board of Pharmacy is mandated to review the schedule
15 annually and maintain a list of current schedules.²⁹ Given the mandate that the Board review the
16 schedule annually, its failure to remove marijuana, cannabis, and cannabis derivatives as Schedule I
17 substances year after year is an affirmation that they satisfy both requirements under NRS 453.166.
18 However, such a conclusion is erroneous given that in 1998, Nevada recognized marijuana as having
19 medical use in treatment under Article 4, Section 38 of the Nevada Constitution.³⁰

20 Because the Board’s misclassification of marijuana, cannabis, and cannabis derivatives in
21 NAC 453.510(4), NAC 453.510(9), and NAC 453.510(10) is in direct contradiction with Article 4,
22 Section 38 of the Nevada Constitution, the misclassification is unconstitutional and must be declared
23 invalid. The clash between Nevada’s explicit recognition of marijuana’s acceptable use in medical
24 treatment, which is enshrined in the Nevada Constitution, and the Board’s classification of

25 ²⁹ NRS 453. 211(1)(a): “The Board shall review the schedule annually and maintain a list of current
26 schedules.”

27 ³⁰ Section 38 not only recognizes that marijuana has accepted medical use in treatment, but it also
28 explicitly lists disorders marijuana must be available to treat.

1 marijuana, cannabis, and cannabis derivatives as Schedule I substances due to the substances having
2 no accepted medical use in treatment presents an important constitutional question. Therefore, the
3 Board exceeded its authority when it placed, or failed to remove marijuana, cannabis, and cannabis
4 derivatives on its list as Schedule I substances and NAC 453.510 (4), NAC 453.510(9), and NAC
5 453.510(10) must be amended to reflect this change.

6 The term “in the United States” as used in NRS 453.166 refers to the geographical confines
7 of the United States, of which Nevada is part. As such, because Nevada law finds that cannabis is
8 acceptable for medical treatment, it cannot be designated a Schedule I substance. Furthermore, the
9 Court finds that it is bound to follow Nevada law, including Article 4, Section 38 of the Nevada
10 Constitution and NRS 453.166, not secondary sources published by federal agencies and medical
11 journals.

12 This Court is not persuaded by Respondents/Defendants argument that Petitioners/Plaintiffs
13 are barred from seeking relief because the regulations at issue have been in force for twenty-two
14 years since the passage of Article 4, Section 38. “Unlawful acts, performed long enough with
15 sufficient vigor, are never enough to amend the law.”³¹

16 To ensure that this Court’s order is effective immediately and that marijuana, cannabis, and
17 cannabis derivatives will no longer be considered Schedule I substances under Nevada law,
18 Petitioners/Plaintiffs urged this Court to order the Board of Pharmacy to comply with NAC 639.110
19 to ensure that Nevada agencies do not consider the regulations active while the Board follows the
20 procedures necessary to amend its list of Schedule I substances. This Court, however, declines to
21 rule on the merits of this argument because as the Board points out, the listing of marijuana,
22 cannabis, and cannabis derivatives in Schedule I no longer has any legal effect with the issuance of
23 this order. *See State v. Eastabrook*, 3 Nev. 173, 180 (1867) (finding that “if a law passed by the
24 legislature be constitutional as to part of its provisions and unconstitutional as to others, the
25 unobjectionable portion may stand, if by rejecting that which is unconstitutional, the whole object
26 and effect of the law is not destroyed.”).

27 ³¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).
28

1 authority to regulate those substances because they are now regulated pursuant to NRS Title 56
2 “Regulation of Cannabis”.

3 As the Board of Pharmacy acknowledges, Title 56, stretching across four chapters of the
4 Nevada Revised Statutes,³⁴ provides a comprehensive regulatory regime for cannabis used
5 recreationally and medically. Every aspect of cannabis production, transportation, distribution, sale,
6 and use is governed by the provisions in Title 56.

7 Relevant to this matter, Title 56 explicitly describes what Nevada executive agencies are
8 involved in this regulatory regime and the extent of their regulatory authority. Under Title 56:

- 9 • The Cannabis Compliance Board is *explicitly* authorized to “adopt regulations
10 necessary or convenient to carry out the provisions of [Title 56].”³⁵ NRS 678A.450(1).
11 This authority includes the regulation of “medical cannabis dispensaries” as defined by
12 NRS 678A.175 and the “medical use of cannabis” as defined by NRS 678A.215.
- 13 • The Cannabis Advisory Commission is *explicitly* authorized to make
14 “recommendations to the Cannabis Compliance Board regarding the regulation of,
15 cannabis and any activity related to the cannabis” and *explicitly* placing the Directors
16 of the Departments of Public Safety and Taxation on the Commission. NRS
17 678A.300(1).
- 18 • The Nevada Division of Public and Behavioral Health is *explicitly* authorized to
19 promulgate regulations related to “the issuance of registry identification cards and
20 letters of approval to persons” eligible for medical cannabis under Nevada law. NRS
21 678B.640.
- 22 • The Nevada Department of Taxation is *explicitly* authorized to conduct tax audits on
23 licensees under Title 56 and to determine the fair market value of wholesale cannabis.
24 NRS 678A.480; NRS 678B.640; and
- 25 • Local governments are *explicitly* authorized to adopt and enforce local cannabis control
26 measures pertaining to zoning and land use for adult-use cannabis establishments. NRS
27 678D.510(1)(d).

28 In the single instance a provision outside of NRS Title 56 authorizes a State agency to regulate an
aspect of the cannabis market (NRS 586.550(2) authorizes the Department of Agriculture to
promulgate regulations regarding what pesticides may be used on cannabis or cannabis products),

³⁴ NRS Chapters 678A–D.

³⁵ The breadth and scope of the NRS Title 56 is in its title: “Regulation of Cannabis”.

1 the provision provides explicit authorization similar to its counterparts in NRS Title 56. In contrast,
2 the Board of Pharmacy has not received similar explicit authorization to regulate *any* aspect of the
3 cannabis market, let alone in a manner that would subject Nevadans to significant criminal penalties
4 for sale or possession of cannabis. In fact, the Board of Pharmacy is not referenced once in the four
5 chapters that comprise Title 56.

6 Considering the Board of Pharmacy’s primary role is to regulate pharmacies and substances
7 distributed from those institutions, the Board’s absence from Title 56 is unsurprising as the
8 substances governed by that Title may only be distributed through dispensaries licensed by the
9 Cannabis Compliance Board, not pharmacies.³⁶ This restriction applies to both medical and
10 recreational cannabis.³⁷ This means that even if the Board of Pharmacy designated cannabis as a
11 substance that a pharmacy could theoretically distribute pursuant to the Board’s regulations,
12 pharmacies would still be barred from doing so pursuant to Title 56. Furthermore, presumably
13 cannabis distributed through pharmacies would be limited to medical use, but the Board itself has
14 acknowledged that it “has no jurisdiction over the medical use of marijuana.”³⁸

15 The Board of Pharmacy’s argument that the Nevada Legislature was required to explicitly
16 inform the Board that it was not included in cannabis’s current regulatory regime is unconvincing.
17 This position inverts the relationship between the Legislative and Executive branches of
18 government. The manner in which Nevada law regulated cannabis underwent a paradigm shift with
19 the passage of the *Initiative*, the enactment of Title 56, and the creation of the Cannabis Compliance
20 Board to coordinate the cannabis market, and the explicit delegation of cannabis regulation to
21 existing agencies that were not the Board. Every aspect of the cannabis market was accounted for

22 ³⁶ NRS 678A.450(1) (authorizing the Cannabis Compliance Board to regulate the dispensation of
23 both medical and recreational cannabis); NRS 678B.210(1) (requiring any person engaging in the
24 business of a medical cannabis establishment to hold a medical cannabis establishment license
25 issued by the Cannabis Compliance Board); NRS 678B.250(1) (requiring any person engaging in the
26 business of an adult-use cannabis establishment to hold an adult-use cannabis establishment license
27 issued by the Cannabis Compliance Board)

28 ³⁷ *Id.*

³⁸ Nevada State Board of Pharmacy, *Practice Frequently Asked Questions*,
https://bop.nv.gov/resources/FAQ/Practice_FAQ/ (August 17, 2022).

1 under the new regime without the Board’s inclusion. Under such circumstances, it is on the Board,
2 not the Legislature, to explain how it still has the authority to regulate the subject matter governed
3 by NRS Title 56, and it has failed to do so.

4 The Board’s claim that its authority to list marijuana, cannabis, and cannabis derivatives as
5 controlled substances in Schedule II, III, IV, or V does not conflict with Title 56 is also
6 unconvincing. The Board’s authority to regulate marijuana, cannabis, and cannabis derivatives under
7 NRS Chapter 453 is inconsistent with Title 56 as explained above. And as the Board itself admits,
8 Section 214 of AB 533 amended NRS 453.005 to read: “[t]he provisions of this chapter do not apply
9 to the extent that they are inconsistent with the provisions of title 56 of NRS.” The fact that NRS
10 Chapter 453 governs the unlawful possession, trafficking or production of marijuana does not
11 support a finding that the Board, therefore, still has the authority to regulate marijuana. It is
12 important to reiterate that Title 56 created a comprehensive regulatory scheme that excluded the
13 Pharmacy Board entirely.

14 Furthermore, the Nevada Supreme Court, on multiple occasions, has clarified that a
15 subsequent statute may repeal a prior statute by implication when the subsequent statute expresses a
16 comprehensive plan to regulate the particular subject matter in question. *See Washington v. State*,
17 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (holding that “if a subsequent statute expresses a
18 comprehensive plan to regulate a particular subject matter, this may repeal prior statutes that deal
19 with smaller aspects of that plan”) (citations omitted)). The regulatory framework created by Title
20 56 is not only comprehensive, but it also fails to empower the Board of Pharmacy with any explicit
21 authority to regulate any aspect of marijuana. Notably, the regulatory framework expressly
22 authorizes numerous other government boards with the power the regulate marijuana, but not the
23 Board of Pharmacy.

24 This order is limited to substances governed by Title 56. It does not apply to substances that
25 are not regulated pursuant to the regime prescribed by Title 56 and so may still be distributed
26 through pharmacies as the regulation of such substances still fall within the authority delegated to
27 the Board of Pharmacy by the Nevada Legislature.

28

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Cannabis, as defined by NRS 678A.085, has accepted medical use in treatment as set forth in the Constitution of the State of Nevada, Article 4, Section 38, titled “Use of plant of genus Cannabis for medical purposes”;

2. The accepted medical use of cannabis enshrined in the Constitution of the State of Nevada, Article 4, Section 38 precludes cannabis from regulation as a Schedule I substance pursuant to the definition of a Schedule I substance set forth in NRS 453.166;

3. The scheduling of cannabis as a Schedule I substance is in direct conflict with Article 4, Section 38 of the Constitution of the State of Nevada and violates NRS 453.166;

4. Any and all provisions under NAC 453.510 scheduling cannabis as a Schedule I substance, specifically NAC 453.510(4) where cannabis is listed as “Marijuana;” NAC 453.510(9) which references “tetrahydrocannabinols;” and NAC 453.510(10) which discusses “CBD;” as well as any and all other references to marijuana, cannabis, and cannabis derivatives, are invalid pursuant to Article 4, Section 38 of the Constitution of the State of Nevada;

5. The Legislature’s directive as set forth in NRS 453.211(1)(a) that, “The Board shall review the schedules annually and maintain a list of current schedules,” requires the Nevada Board of Pharmacy to update the schedule of controlled substances to comply with the Nevada Constitution and conform with the statutory definitions of each schedule;

6. The Nevada Board of Pharmacy acted outside of its authority when it failed to remove cannabis from the list of Schedule I substances upon the enactment of Article 4, Section 38 of the Constitution of the State of Nevada, which recognizes the use of cannabis for medical treatment;

7. The Nevada Board of Pharmacy is hereby ordered to remove cannabis from the list of Schedule I substances, specifically from NAC 453.510(4) where it is listed as “Marijuana”, NAC

1 453.510(9) which references “tetrahydrocannabinols”, and NAC 453.510(10) which discusses
2 “CBD”, as well as any and all other references to marijuana, cannabis, and cannabis derivatives;³⁹

3 8. The listing of marijuana, cannabis, and cannabis derivatives in Schedule I under NAC
4 453.510 no longer has any legal effect;

5 9. The Nevada Board of Pharmacy is hereby ordered to cease the regulation of
6 substances subject to regulation pursuant to Title 56; and

7 10. If any substances regulated pursuant to Title 56 are currently scheduled as a
8 controlled substance, the Board must remove such substance from the agency’s schedule of
9 controlled substances.

10 Petitioners’ Petition for Writ of Mandamus and Request for Declaratory Relief is
11 **GRANTED.**

12 Dated this 26th day of October, 2022

13 
14 _____

15 **FF8 A68 E46D 92DE**
16 **Joe Hardy**
17 **District Court Judge**

18
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26 _____
27 ³⁹ NAC 639.110 “When any regulation adopted by the Board and filed with the Secretary of State
28 expires by its own terms, is repealed or is declared unconstitutional by a court of competent
jurisdiction, the Executive Secretary shall so inform the Secretary of State and request that it be
placed in an inactive file.”

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Cannabis Equity and Inclusion
7 Community, Plaintiff(s)

CASE NO: A-22-851232-W

8 vs.

DEPT. NO. Department 15

9 Nevada ex reL. Board of
10 Pharmacy, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 10/26/2022

16 Ashley Balducci

abalducci@ag.nv.gov

17 Luke Rath

lrath@ag.nv.gov

18 Emily Bordelove

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19 Peter Keegan

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20 William Kandt

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21 Sadmira Ramic

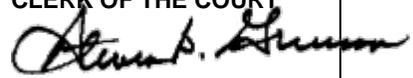
ramic@aclunv.org

22 Christopher Peterson

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APP0063



1 **NOAS**

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11 TEL: (775) 850-1440

12 *Attorneys for Respondent/Defendant*

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 CANNABIS EQUITY AND INCLUSION
16 COMMUNITY (CEIC), a domestic
17 nonprofit corporation; ANTOINE POOLE,
18 an individual,

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

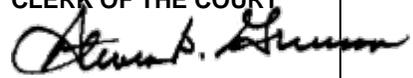
25 **NOTICE OF APPEAL**

26 NOTICE IS HEREBY GIVEN that THE STATE OF NEVADA ex rel. its BOARD
27 OF PHARMACY, hereby appeals pursuant to NRAP 3 to the Nevada Supreme Court from
28 the Judgment and Order Granting Petition for Writ of Mandamus and Request for
Declaratory Relief entered on October 26, 2022. The Notice of Entry of Order in this
matter was filed on October 26, 2022.

1 Respectfully submitted this 23rd day of November 2022.

2 Pursuant to NRS 239B.030 I affirm that this document does not contain personal
3 information.

4 By: /s/ Brett Kandt
5 Brett Kandt (Bar No. 5384)
6 General Counsel
7 Peter K. Keegan (Bar. No. 12237)
8 Assistant General Counsel
9 *Attorneys for Respondent/Defendant*
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1 **MSTY**

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13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 CANNABIS EQUITY AND INCLUSION
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17 nonprofit corporation; ANTOINE POOLE,
18 an individual,

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20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

HEARING REQUESTED

25 **RESPONDENT/DEFENDANT’S MOTION TO STAY JUDGMENT AND ORDER**
26 **PENDING APPEAL**

27 Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and
28 through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant
General Counsel, hereby submits this motion to stay the Judgment and Order Granting
Petition for Writ of Mandamus and Request for Declaratory Relief (“Judgment and Order”)
entered by the Court on October 26, 2022. This motion is made pursuant to NRAP 8 and
NRCF 62 and based upon the following points and authorities and the papers and pleadings
on file herein.

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that the foregoing motion will be heard before the above-
3 captioned Court on ____, 2022, at ____ a.m./p.m.

4 By: /s/ Brett Kandt
5 Brett Kandt (Bar No. 5384)
6 General Counsel
7 Peter K. Keegan (Bar. No. 12237)
8 Assistant General Counsel
9 *Attorneys for Respondent/Defendant*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PROCEDURAL HISTORY**

3 On October 26, 2022, the Court entered the Judgment and Order granting
4 Petitioners declaratory and writ relief, ruling in pertinent part that the listing of
5 marijuana, cannabis, and cannabis derivatives (hereinafter “marijuana”) as Schedule I
6 controlled substances in NAC 453.510 (4), (9) and (10) is in direct conflict with Nev. Const.
7 art. 4, § 38 and violates NRS 453.166, and ordering that marijuana be removed from NAC
8 453.510 and that the Board “cease the regulation of substances subject to regulation
9 pursuant to Title 56” of NRS. The Board has filed a Notice of Appeal from the Judgment
10 and Order concurrently with this motion.

11 **II. LEGAL STANDARD**

12 “In the ordinary course of civil appeals, an appellant must comply with NRCP
13 8(a) which provides that an application for stay of a judgment or order must typically be
14 made to the district court.” *State ex rel. Pub. Serv. Comm'n v. First Judicial Dist. Court*,
15 94 Nev. 42, 44, 574 P.2d 272, 273-74 (1978) cited in *Clark Cty. Office of the Coroner/Medical*
16 *Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018). “When an
17 appeal is taken by the State . . . and the operation or enforcement of the judgment is stayed,
18 no bond, obligation, or other security shall be required from the appellant.” *Id.*

19 When considering a stay, courts weigh a number of factors: (1) whether the object
20 of the appeal will be defeated if the stay is denied; (2) whether petitioner will suffer
21 irreparable injury if the stay is denied; (3) whether the real party in interest will suffer
22 irreparable injury if the stay is granted; and (4) whether petitioner is likely to prevail on
23 the merits of the appeal. NRAP 8(c). No single factor is dispositive and, “if one or two
24 factors are especially strong, they may counterbalance other weak factors.” *Mikohn*
25 *Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

1 **III. ARGUMENT**

2 The Judgment and Order represents a tectonic shift in State law with repercussions
3 far beyond the scope of the Board’s jurisdiction: it impacts State regulation of marijuana
4 altogether, the delineation of what may or may not constitute criminal conduct and,
5 ultimately, public safety. Questions of whether an irreconcilable conflict exists between
6 Nev. Const. art. 4, § 38, NRS 453.166, and NAC 453.510, and of whether the Board has any
7 authority to schedule marijuana as a controlled substance, are issues of first impression,
8 implicating the separation of powers, involving constitutional and statutory interpretation,
9 with far-reaching ramifications. A stay is in the best interests of the State pending
10 resolution of the Board’s appeal.

11 **A. Denying the stay will defeat the object of the appeal and result in**
12 **irreparable injury to the public caused by legal ambiguity over the**
13 **status of marijuana under State law.**

14 Rendering portions of NAC 453.510 unenforceable and requiring the Board to
15 commence the administrative rulemaking process to remove marijuana from Schedule I
16 even as the Board seeks appellate review of the Judgment and Order will create a layer of
17 legal uncertainty where none existed before, thrusting Nevada into a legal “no man's land”
18 as to the status of marijuana outside of NRS Title 56. This results in part from the
19 language and scope of NRS Chapter 453, and in part from the requirements of the
20 Administrative Procedure Act, NRS Chapter 233B.

21 Due to the timing of the Judgment and Order, the Board must first adopt a
22 temporary regulation suspending the listing of marijuana in Schedule I. NRS 233B.063(3).
23 Such a temporary regulation would expire by limitation on November 1, 2023. *Id.*; *see also*
24 *Progressive Leadership All. of Nev. v. Cegavske*, No. 85434, 2022 Nev. Unpub. LEXIS 780
25 *2 (Oct. 25, 2022). Thereafter, a permanent regulation removing marijuana from NAC
26 453.510 (4), (9) and (10) must be adopted after July 1, 2023, following all the procedural
27 formalities required by NRS Chapter 233B. Should the Board ultimately prevail on appeal,
28 this would then necessitate amending NAC 453.510 to place marijuana *back* into Schedule
I, a task comparable to putting toothpaste back in the tube or unscrambling an egg.

1 The peril of requiring the Board to amend NAC 453.510 at this juncture is further
2 evidenced in that the Court has also ruled that “the Board no longer has the authority to
3 regulate [marijuana, cannabis, and cannabis derivatives] because they are now regulated
4 pursuant to NRS Title 56.” Judgment and Order at 13:25-14:1. If marijuana falls within
5 the exclusive jurisdiction of Title 56, this raises the question of whether the Board even
6 possesses the authority to remove marijuana from NAC 453.510, or whether this requires
7 an act by the Nevada Legislature.¹ Furthermore, NRS 453.2182 mandates that, in the
8 absence of any objection, the Board *shall* designate a substance consistent with federal law
9 without making the findings required by NRS 453.166. Marijuana remains a Schedule I
10 controlled substance under federal law, 21 CFR § 1308.11. The Board must navigate these
11 legal straits in an effort to comply with the Judgment and Order.

12 “Administrative agencies have only those powers which the legislature expressly or
13 implicitly delegates.” *Clark Cty. v. Equal Rights Comm'n*, 107 Nev. 489, 492, 813 P.2d
14 1006, 1007 (1991) (citing *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208,
15 467 P.2d 96, 96 (2007)). “Official powers of an administrative agency cannot be assumed by
16 the agency, nor can they be created by the courts in the exercise of their judicial
17 function. The grant of authority to the agency must be clear.” *Andrews*, 86 Nev. at 208,
18 467 P.2d at 97. If the Judgment and Order is upheld on appeal, this will clear the way for
19 the procedural housekeeping of removing marijuana from NAC 453.510. However, if the
20 Board is confronted with a legal challenge to its authority to deschedule marijuana while
21 the appeal pending, this will only murk the waters.

22 **B. Petitioners/Plaintiffs will suffer no irreparable injury if the stay is**
23 **granted.**

24 A stay will have no immediate nor irreparable impact on Petitioners/Plaintiffs
25 Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole. The Court ruled
26 that CEIC has associational standing, organizational standing and standing under the

27
28 ¹This is also seemingly incongruous given the absence of marijuana from the list of
substances that the Board is expressly prohibited from scheduling under NRS 453.2186.

1 public-importance doctrine on based upon CEIC’s efforts in assisting individuals with prior
2 cannabis-related criminal convictions, and that Poole has standing based upon his prior
3 felony conviction for possession of marijuana pursuant to NRS 453.336. Judgment and
4 Order at 2:6-20 and 9:16-10:14. Those prior convictions will not be affected by a stay.

5 **C. The Board presents a substantial case on the merits involving**
6 **serious legal questions.**

7 With regard to the merits of the Board’s appeal, the Nevada Supreme Court has
8 previously stated:

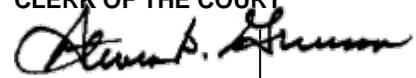
9 “[A] movant does not always have to show a probability of success on the
10 merits, the movant must ‘present a *substantial case* on the merits when a
11 serious legal question is involved and show that the balance of equities weighs
heavily in favor of granting the stay.”

12 *Hansen v. 8th Judicial Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v.*
13 *Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). This appeal concerns two
14 serious legal questions.

15 First, whether listing marijuana in Schedule I directly conflicts with Nev. Const. art.
16 4, § 38 or NRS 453.166(2), which turns upon whether the constitutional right of a patient
17 in Nevada to use marijuana “upon the advice of a physician” equates to marijuana having
18 “accepted medical use in treatment in the United States.”² Second, whether the Board
19 retains any authority to regulate substances subject to regulation pursuant to NRS Title
20 56, or if that authority was repealed by implication.³

23 ² The Nevada Supreme Court’s recent decision in *Ceballos v. NP Palace, LLC*, 138
24 Nev. Adv. Op. 58, 514 P.3d 1074 (2022), casts some level of doubt on this Court’s legal
25 conclusion that since Nevada falls within the geographical confines of the United States,
whether a substance has “accepted medical use in treatment in the United States” can be
determined solely under State law.

26 ³ In 1981 the Nevada Legislature empowered the Board of Pharmacy to designate,
27 by regulation, the substances to be contained in each schedule. See 1981 Nev. Stats. ch.
28 402 §§ 1-39 at 734-750; see also *Miller v. Jacobson*, 104 Nev. 600, 602, 763 P.2d 356, 357
(1988); *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985).



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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

CANNABIS EQUITY AND INCLUSION
COMMUNITY (CEIC), a domestic nonprofit
corporation; ANTOINE POOLE, an individual,

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W

Department: 15

**PETITIONERS’/PLAINTIFFS’ OPPOSITION TO RESPONDENT’S/DEFENDANT’S
MOTION TO STAY JUDGMENT AND ORDER PENDING APPEAL**

The Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole, by and through counsel Sadmira Ramic, Esq., Christopher M. Peterson, Esq., and Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, pursuant to NRAP 8 and NRCP 62, hereby submit this Opposition to Respondent’s/Defendant’s Motion to Stay Judgment and Order Pending Appeal.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Petitioners/Plaintiffs filed a petition for a writ of mandamus challenging the Nevada State
3 Board of Pharmacy’s (“Board”) designation of cannabis as a Schedule I substance. The Petition
4 raised two important legal issues: (1) whether the Board’s designation of cannabis as a Schedule I
5 substance, which requires the Board to find that that cannabis has “no accepted medical use in
6 treatment in the United States”, violates Article 4, Section 38 of the Nevada Constitution, which
7 explicitly guarantees that patients with certain enumerated medical diagnoses will have access to
8 cannabis for medical treatment, and (2) whether the Board no longer has the authority to regulate
9 cannabis following the passage of NRS Title 56, which specifically defines what state agencies
10 will regulate the cultivation, transportation, storage, dispensation, taxation, and use of cannabis in
11 Nevada but makes no reference to the Board.
12

13 After conducting motion practice, on October 26, 2022, this Court ultimately answered
14 both questions in the affirmative, issuing an order mandating that the Board 1) remove cannabis
15 and its derivatives from the list of Schedule I substances, and 2) cease the regulation of substances
16 subject to regulation pursuant to Title 56. The Court’s ruling put an end to the Board’s twenty plus
17 years of violating the Nevada Constitution and the harm suffered not only by the Petitioners, but
18 Nevadans across the state.
19

20 Now the Board seeks a stay of this judgment and order pending appeal, claiming that this
21 Court’s order will create legal uncertainty, that CEIC and Mr. Poole will not suffer irreparable
22 harm if the stay is granted, and that Article 4, Section 38 of the Nevada Constitution, of which this
23 Court found the Board to be in violation, is subject to “two or more reasonable but inconsistent
24 interpretations.”¹ These arguments are insufficient to satisfy the Board’s burden to establish the
25

26 _____
27 ¹ Resp’t Mot. p. 4,5,7.

1 four factors under NRAP 8(c) required for this Court to issue the stay, and the Board's motion
2 should be denied.

3 **I. LEGAL STANDARD**

4 NRAP 8(c) outlines four factors that must be considered in determining whether a stay
5 should be granted: 1) whether the object of the appeal or writ petition will be defeated if the stay
6 is denied; 2) whether appellant will suffer irreparable or serious injury if the stay is denied; 3)
7 whether respondent/real party in interest will suffer irreparable or serious injury if the stay is
8 granted; and 4) whether appellant is likely to prevail on the merits of the appeal or writ petition.²
9 No one fact carries more weight than the others.³
10

11 **II. ARGUMENT**

12 **A. The object of the appeal will not be defeated if the motion to stay the judgment and**
13 **order is denied.**

14 The object of the Board's appeal concerns two matters: 1) maintaining cannabis and its
15 derivatives on the listing of Schedule I substances; and 2) preserving its ability to regulate
16 cannabis. If the stay is not granted, the Board will have to remove cannabis and its derivatives
17 from the list of Schedule I substances and cease regulating cannabis. If the Board is successful on
18 appeal, by its own admission⁴ there is nothing that prevents the Board from categorizing cannabis
19 as a Schedule I substance again and continuing its regulation. Thus, the object of the appeal will
20 not be defeated if the stay is denied.
21

22 **B. The Board has not demonstrated that it will suffer irreparable or serious injury if the**
23 **motion to stay the judgement and order is denied.**

24 ² NRAP 8(c); *see also Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982
25 (2000).

26 ³ *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004).

27 ⁴Resp't Mot. p. 4.

1 The Board has failed to articulate the irreparable injury it would suffer if the stay were
2 denied.

3 First, the Board focuses on how the public will be irreparably injured because denying the
4 stay will result in “legal ambiguity over the status of marijuana under State law.”⁵ However, the
5 second factor to consider under NRAP 8(c) is the irreparable harm suffered by the *appellant*, in
6 this case the Board, not third-party individuals or entities.⁶ Furthermore, even if the harm to the
7 public was a factor in this determination, no legal ambiguity would exist as the Board suggests.
8 Cannabis’s legal status would be clear – cannabis will no longer be a Schedule I substance and the
9 Board would be unable to regulate cannabis, leaving the remainder of Schedule I intact and
10 cannabis subject to the regulation provided by NRS Title 56 and other relevant statutes.
11

12 Second, the Board emphasizes the hardship of having to remove cannabis and its
13 derivatives from the list of Schedule I substances, and if successful on appeal, the hardship of
14 placing them back on the list. The key words in this factor are “irreparable or serious.” The
15 Supreme Court of Nevada has held that “mere injuries, however substantial, in terms of money,
16 time, and energy necessarily expended in the absence of a stay are not enough to show irreparable
17 harm.”⁷ The process the Board describes as having to undertake- passing a temporary regulation
18 suspending the listing of cannabis in Schedule I, possibly having to adopt a permanent regulation,
19 and then following timely procedures to place cannabis back on the list of Schedule I substances
20 shall it be successful on appeal- is (at worst) such a “mere injury”. The steps the Board describes
21
22

23
24 _____
25 ⁵ Resp’t Mot. p. 4.

26 ⁶ See NRAP 8(c)(2).

27 ⁷ *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982 (2000).

1 require their time and effort but do not equate to irreparable harm because removing cannabis in
2 no way prevents it from being placed on the list again, nor does it change the consequences of its
3 listing should the Board successfully appeal this Court’s order.

4 Finally, the Board expresses concern over its ability to comply with the Court’s order,
5 arguing that because the Court ruled that the Board no longer has the authority to regulate
6 substances covered under NRS Title 56, there is a question as to whether it can remove cannabis
7 from NAC 453.510.⁸ The suggestion that the Board cannot remove a substance without legislative
8 action is illogical. Using the Board’s argument, it would follow that any time the Board acted
9 outside its authority, and a court of competent jurisdiction found them to be doing so, they could
10 continue to violate the law until the Legislature passed legislation requiring the Board to act within
11 the confines of the law. The Board misses the ultimate outcome of the Court’s ruling – by removing
12 cannabis and its derivatives from Schedule I, found in NAC 453.510, they are not regulating
13 cannabis in violation of the Court’s order but are instead bringing NAC 453.510 into compliance
14 with Article 4, Section 38 of the Nevada Constitution. Additionally, this argument completely
15 ignores the power granted to the Board by the legislature to revise, delete, or reschedule substances
16 enumerated in Schedule I.⁹

17
18
19 **C. CEIC, Mr. Poole, and the public will suffer irreparable or serious injury if the stay**
20 **is granted.**

21
22
23 ⁸ Resp’t Mot. p. 5.

24 ⁹ See NRS 453. 211 (“the Board shall review the schedules annually and maintain a list of current
25 schedules [and] upon the revision of a schedule, cause a copy of the revised schedule to be sent to
26 each district attorney, public defender and judge in the State of Nevada”) and NRS 453.146 (“The
27 Board shall administer the provisions of [NRS 453.011](#) to [453.552](#), inclusive, and may add
substances to or delete or reschedule all substances enumerated in schedules I, II, III, IV and V by
regulation”).

1 Should the stay be granted, CEIC, Mr. Poole, and the public whose interest CEIC
2 represents pursuant to the significant public importance doctrine will suffer irreparable harm.
3 Unlike the second factor in NRAP 8(c), this factor incorporates not only the harm suffered by the
4 Petitioners, but also the public as a real party in interest.¹⁰ Nevada courts have addressed the issue
5 of "irreparable harm" and held that harm is generally "irreparable" when it cannot be adequately
6 remedied by compensatory damages.¹¹

7 The Board downplays the significance of their constitutional violations, and the effect the
8 Court's judgment has in alleviating the prolonged harm to Petitioners and the public. It pinpoints
9 the Court's finding that Petitioners had standing to seek writ relief yet concludes that a stay would
10 have no effect on Mr. Poole's prior conviction, CEIC as an organization, nor any of CEIC's current
11 or potential members. This conclusion is inaccurate.

12 The harm the public will suffer if the stay is granted is relevant and of importance under
13 this factor because the public is a real party in interest. Additionally, this Court found CEIC, as a
14 representative of the public, to have standing under the significant public importance doctrine as
15 outlined in *Nev. Pol'y Rsch Inst., Inc. v. Cannizzaro*, 507 P.3d 1203. If cannabis continues to be
16 listed as a Schedule I substance, individuals will continue to be arrested, incarcerated, and
17 convicted under statutes triggered by the Board's unconstitutional regulation of cannabis.

18 As it relates to Mr. Poole and CEIC members who have been convicted under statutes
19 stemming from the Board's unconstitutional regulation of cannabis, they too would suffer
20 irreparable harm. While the Court's order does not directly address Mr. Poole's unconstitutional
21

22
23
24 ¹⁰ See NRAP 8(c)(3).

25 ¹¹ See *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 183 P.3d 895,901 (2008) (citing
26 *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004)); *Dixon*
27 *v. Thatcher*, 103 Nev. 414,415 742 P.2d 1029-30 (1987).

1 convictions, its finding that the Board’s designation of cannabis as a Schedule I substance violates
2 Article 4, Section 38 of the Nevada Constitution serves as a stepping stone for these individuals to
3 seek to have their unconstitutional convictions overturned. A stay at this juncture will halt these
4 efforts, and by extension will continue the suffering of collateral consequences related to these
5 convictions.

6 These harms are not simply the expenditure of time or a delay in receiving a monetary
7 judgment; they are everyday impacts on their lives that cannot be remedied by compensatory
8 damages and thus constitute irreparable harm.

9
10 **D. The Board has failed to show that it is likely to prevail on the merits of the appeal.**

11 Although a movant does not always have to show a *probability* of success on the merits,
12 the movant must present a *substantial* case on the merits when a serious legal question is involved
13 and show that the balance of equities weighs *heavily* in favor of granting the stay.¹² The Board’s
14 claims that it has made “a substantial case on the merits” and the balance of equities weighs in
15 favor of granting a stay is unsupported by any legal analysis.

16
17 While we agree that the issues within the case are of important legal significance, the
18 Board’s opinion that the constitutional amendment at issue herein can be interpreted differently
19 than the current ruling or that repealing the Board’s authority by implication makes issues more
20 complex, by themselves, fail to meet the burden of a “substantial case on the merits.” The Board
21 cites to two cases in its motion, both of which are distinguishable and fail to support the Board’s
22 arguments.¹³

23
24
25 ¹² *Fritz Hansen A/S*, 116 Nev. at 659, 6 P.3d at 987 citing *Ruiz v. Estelle*, 650 F.2d 555, 565
26 (5th Cir. 1981) (emphasis added).

27 ¹³ Resp’t Mot. p. 7.

1 The first case the Board references is *Educ. Freedom Pac v. Reid*, 512 P.3d 296 (Nev.
2 2022). In that case, the Supreme Court looked at the plain language of a constitutional provision
3 to determine if it was ambiguous. The Court determined that the provision was ambiguous because
4 “it was susceptible to two or more reasonable but inconsistent interpretations” due to it being in
5 direct conflict with another constitutional provision.¹⁴ The ambiguity existed because both
6 constitutional provisions hold the same weight. This is far from comparable from the instant case
7 where there is no other constitutional provisions in conflict with Article 4, Section 38.
8

9 The second case the Board cites to is *Washington v. State*, 117 Nev. 735 (2001). This case
10 does not support the Board’s claim that issues involving the loss of authority by implication signify
11 it is likely to prevail on the merits. Rather, *Washington* serves as an example of how revocation by
12 implication functions and supports the Court’s finding that the Board’s authority to regulate
13 cannabis was removed with the passage of NRS Title 56. At issue in *Washington* were two statutes
14 that rendered the same conduct illegal but imposed different levels of punishment. One rendered
15 the sale of an imitation controlled substance a misdemeanor, the other a felony. The court
16 concluded that because the two statutes proscribed the same conduct, the one that preceded the
17 other was repealed by implication.¹⁵ Similarly, here, the Nevada Legislature gave the Board
18 general authority to regulate cannabis with the passage of NRS 453.146. However, subsequently,
19 the Legislature passed Title 56 and granted regulating powers to other entities, including the Board
20 of Cannabis Compliance. Because both involve the same conduct-the regulation of cannabis- and
21 Title 56 was enacted after NRS 453.146, the Board’s authority to regulate cannabis was repealed
22 by implication.
23
24

25 ¹⁴ *Educ. Freedom Pac*, 512 P.3d at 302.

26 ¹⁵ *Washington*, 117 Nev. at 741-42.
27

1 The Board has not presented a “*substantial* case on the merits” and has not shown that the
2 balance of equities weighs *heavily* in favor of granting the stay. As such, it has failed to show that
3 it is likely to succeed on the merits, and the fourth factor of NRAP 8(c) has not been met.

4 **V. CONCLUSION**

5 As set forth above, the Board has not satisfied the elements under NRAP 8(c) and its motion
6 for stay of the judgment and order should be denied in its entirety.
7

8
9 DATED this 7th day of December 2022.

10 This document does **not** contain the
11 Social Security number of any person.
12 Pursuant to NRS 53.045, I declare under
13 penalty of perjury that the foregoing is
14 true and correct.

15 **AMERICAN CIVIL LIBERTIES
16 UNION OF NEVADA**

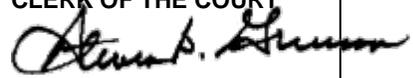
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December 2022, I caused a true and correct copy of the foregoing **Opposition to Respondent's/Defendant's Motion to Stay Judgment and Order Pending Appeal** to be electronically filed and served to all parties of record via the Court's electronic filing system to all parties listed on the e-service master list.

/s/Christopher Peterson
Employee for the ACLU of Nevada



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13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 CANNABIS EQUITY AND INCLUSION
16 COMMUNITY (CEIC), a domestic
17 nonprofit corporation; ANTOINE POOLE,
18 an individual,

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

Hearing Date: January 9, 2023

Hearing Time: 9:00 AM

25 **RESPONDENT/DEFENDANT'S REPLY MEMORANDUM OF POINTS AND**
26 **AUTHORTIES ON MOTION TO STAY JUDGMENT AND ORDER PENDING**
27 **APPEAL**

28 Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant General Counsel, hereby submits this reply memorandum of points and authorities on the Board’s motion to stay the Judgment and Order Granting Petition for Writ of Mandamus and Request for Declaratory Relief (“Judgment and Order”) entered by the Court on October 26, 2022. This reply is made pursuant to EDCR 2.20(g) and based in part upon the declaration of Captain Joshua Bitsko attached hereto as Exhibit 1.

1 **I. PROCEDURAL HISTORY**

2 The Board’s appeal from the Judgment and Order was docketed in the Nevada
3 Supreme Court on December 8, 2022, as Docket Number 85756.

4 **II. ARGUMENT**

5 Petitioners oppose a stay of the Judgment and Order pending appeal on the basis
6 that 1) the object of the appeal will not be defeated since the Board can later reschedule
7 cannabis as a Schedule I substance; 2) the Board has failed to articulate what irreparable
8 injury it would personally suffer without a stay; 3) the public is a real party in interest and
9 “individuals will continue to be arrested, incarcerated, and convicted” while Mr. Poole and
10 CEIC members will face delay in seeking to have their convictions overturned; and 4) the
11 Board has failed to present a substantial case on the merits. None of these arguments
12 withstand closer scrutiny.

13 **A. Public safety is at risk if a stay is not granted.**

14 Petitioners’ invocation of whether a stay is in the public interest cuts both ways. The
15 Nevada Supreme Court has articulated in a variety of cases that courts may weigh the
16 public interest in determining whether to grant or deny a stay. *See Clark Cty. Office of the*
17 *Coroner/Medical Exam’r v. Las Vegas Review-Journal*, 134 Nev. 174, 179, 415 P.3d 16, 20
18 n.1 (2018) (Cherry, J., concurring in part and dissenting in part) (considering stay of a
19 money judgment against government entity pending appeal); *Tate v. State Bd. of Med.*
20 *Exam’rs*, 131 Nev. 675,681, 356 P.3d 506, 510-11 (2015) (considering stay of licensing board
21 disciplinary order pending judicial review); *Aspen Fin. Servs. v. Eighth Judicial Dist. Court*
22 *of Nev.*, 128 Nev. 635, 650-51, 289 P.3d 201, 211 (2012) (considering stay of civil proceeding
23 due to a pending criminal investigation); *see also Nken v. Holder*, 556 U.S. 418, 434, 129 S.
24 Ct. 1749, 1761 (2009) (where the public interest lies is a factor when considering a stay in
25 federal courts). In this instance the public interest weighs in favor of a stay.

26 Public safety is the crux of the Board’s motion. The Board’s interest *is* the public
27 interest insofar as the Board is charged with enforcing Nevada law to protect the health,
28 safety and welfare of the public. *See* NRS 622.080, NRS 639.070(1)(a), NRS 639.213 and

1 NRS 639.2171(1). The importance of a stay is not a mere question of administrative
2 convenience: in the event that relevant offenses are committed while marijuana's
3 designation as a controlled substance is not in effect, dangerous criminal activity will go
4 unabated and unpunished, and the public will suffer the consequences. See declaration of
5 Captain Joshua Bitsko at ¶¶ 6-8.

6 The Judgment and Order abolishes the long-standing regulatory scheme over
7 unlawful activities involving marijuana put in place by the Legislature when enacting the
8 Nevada Uniform Controlled Substances Act in 1971,¹ and then subsequently empowering
9 the Board in 1981² to designate, by regulation, the substances to be contained in each
10 schedule based upon scientific evidence, and to some extent, federal law.³ As a result,
11 marijuana will be essentially unregulated outside of the narrow confines of NRS Title 56.
12 The Cannabis Compliance Board lacks the statutory authority to step into this void, as its
13 jurisdiction is strictly limited to regulating the industries engaged in providing marijuana
14 for medical or adult use in conformance with the voter-approved ballot initiatives.

15 The resulting legal ambiguity and the risk this poses to the public are real and
16 immediate. First off, the offenses and prohibitions related to controlled substances set forth
17 in NRS Chapter 453 will no longer apply to marijuana, including, without limitation, NRS
18 453.316 (unlawful to open or maintain place for unlawful sale, gift or use of controlled
19 substance), NRS 453.321 (offer, attempt or commission of unauthorized act relating to
20 controlled substance), NRS 453.333 (unlawfully making available controlled substance
21 which causes death), NRS 453.334 (sale of controlled substance to minor), NRS 453.336(1)
22 and (2) (unlawful possession of controlled substance not for purpose of sale) and NRS
23 453.337 (unlawful possession for the purpose of sale of any Schedule I or II controlled

24 ¹ See 1971 Nev. Stats. ch. 667 §§ 1-154 at 1999-2048.

25 ² See 1981 Nev. Stats. ch. 402 §§ 1-39 at 734-750.

26 ³ See NRS 453.146 (determinative factors); NRS 453.166 (Schedule I tests); NRS
27 453.176 (Schedule II tests); NRS 453.186 (Schedule III tests); NRS 453.196 (Schedule IV
28 tests); NRS 453.206 (Schedule V tests); NRS 453.2182 (scheduling based upon treatment
under federal law); NRS 453.2186 (prohibitions to scheduling); NRS 453.2188 (scheduling
if controlled by federal law pursuant to international treaty, convention or protocol).

1 substance). The relevant provisions in Title 56, specifically NRS 678C.300, NRS 678D.300
2 and NRS 678D.310, do not fully account for these unlawful and potentially dangerous
3 activities.

4 This legal ambiguity and the corresponding risk are perhaps best illustrated by the
5 impact on NRS 202.360 and NRS 202.257. NRS 202.360 prohibits certain classes of people
6 from owning or possessing firearms, including persons with prior felony convictions
7 (subsection 1(b)) and persons who unlawfully use a controlled substance (subsection 1(f)).
8 The Judgment and Order nullifies the application of these prohibitions for persons
9 possessing firearms while engaged in unlawful marijuana-related activities.

10 NRS 202.257 prohibits the possession of a firearm while under the influence of a
11 controlled substance. Although NRS 678C.300(1)(c) and NRS 678D.300(1)(c) both
12 expressly state that “possessing a firearm in violation of paragraph (b) of subsection 1 of
13 NRS 202.257” is not exempt from state prosecution, the Judgment and Order nullifies the
14 application of NRS 202.257 since marijuana will no longer be a controlled substance, thus
15 apparently permitting a person under the influence of marijuana to wield a firearm. The
16 ramifications of the Judgment and Order, however unintended, are broad and far-reaching.
17 A stay is where the public interest clearly lies given the implications.

18 **B. Petitioners/Plaintiffs will suffer no irreparable injury if the stay is**
19 **granted.**

20 Petitioners cannot demonstrate that any delay in their bid to have prior cannabis-
21 related criminal convictions overturned constitutes “irreparable injury” precluding a stay.
22 “[A] mere delay in pursuing . . . litigation normally does not constitute irreparable harm.”
23 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004). Since the
24 Judgment and Order expressly states that it is limited to the issues raised before the Court
25 on the Petition, and since Petitioners acknowledge that the ruling does not directly address
26 the validity of Mr. Poole’s conviction or any other cannabis-related criminal convictions,⁴
27 any collateral consequences related to these prior convictions and any future efforts to have

28 ⁴ Opp. at p. 6-7.

1 them overturned are not relevant to the Board’s motion to stay.⁵ Furthermore, Petitioners’
2 overbroad assertion that “individuals will continue to be arrested, incarcerated, and
3 convicted” for marijuana-related offenses is purely speculative and does not constitute
4 irreparable injury. *See, e.g., Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d
5 466, 472 (9th Cir. 1984). Finally, it is crucial to note that Petitioners did not allege, and
6 the Judgment and Order makes no finding, that the continued listing of marijuana in
7 Schedule I has ever prevented any person from using marijuana on the advice of a
8 physician in conformance with Nev. Const. art. 4, § 38 and NRS Chapter 678C, or from
9 engaging in recreational use of marijuana in conformance with NRS Chapter 678D. And
10 as demonstrated above, the public interest weighs in favor of a stay.

11 **C. The Board presents a substantial case on the merits involving serious**
12 **legal questions.**

13 Petitioners brush aside the Board’s argument that it presents a substantial case on
14 the merits by quibbling over the case law cited. First, Nev. Const. art. 4, § 38 is susceptible
15 to a reasonable interpretation that avoids any direct conflict with the Nevada Controlled
16 Substances Act, since marijuana’s continued designation as a Schedule I controlled
17 substance does not impair the constitutional right of a patient in Nevada to use marijuana
18 “upon the advice of a physician.” “A legislative enactment is presumed to be constitutional
19 absent a clear showing to the contrary.” *Starlets Int’l v. Christensen*, 106 Nev. 732, 735,
20 801 P.2d 1343, 1344 (1990) (citations omitted). The constitutional right conferred under
21 art. 4, § 38 does not require that marijuana have an “accepted medical use in treatment in
22 the United States” under NRS 453.166(2). “[W]hen ‘a statute may be
23 given conflicting interpretations, one rendering it constitutional, and the other
24 unconstitutional, the constitutional interpretation is favored.” *State v. Kopp*, 118 Nev.
25 199, 203, 43 P.3d 340, 342 (2002) (quoting *Sheriff, Washoe Cty. v. Wu*, 101 Nev. 687, 689-
26

27 ⁵ The only collateral consequence ever identified was Mr. Poole’s allegation of
28 “hardship in obtaining employment” in paragraph 6 of his declaration in support of the
Petition for Writ of Mandamus.

1 90, 708 P.2d 305, 306 (1985)).

2 Second, the issue of whether the Board’s long-standing authority to schedule
3 marijuana has been repealed by implication is not as cut-and-dried as Petitioners portray
4 it. Long-standing Nevada Supreme Court precedent establishes that “repeals by
5 implication are not favored.” *Thorpe v. Schooling*, 7 Nev. 15, 17 (1871); *see also State ex*
6 *rel. Hallock v. Donnelly*, 20 Nev. 214, 217, 19 P. 680, 682 (1888); *Gill v. Goldfield Consol.*
7 *Mines Co.*, 43 Nev. 1, 7-9, 176 P. 784, 786-87 (1919); *Warren v. De Long*, 57 Nev. 131, 145,
8 59 P.2d 1165, 1169 (1936); *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034
9 (1972). If the Legislature intended the enactment of NRS Title 56⁶ to occupy the entire
10 field of marijuana regulation, why were all laws related to marijuana not removed from
11 NRS Chapter 453 and placed in Title 56? *Compare Douglas Cty. Contractors Ass’n v.*
12 *Douglas Cty.*, 112 Nev. 1452, 1464-65, 929 P.2d 253, 260-61 (1996) (holding that statutory
13 scheme for school funding was clearly intended to exclusively occupy that particular field).
14 If the Legislature intended marijuana to no longer be regulated as a controlled substance,
15 why are there currently 53 references to “marijuana” in the Nevada Controlled Substances
16 Act? Why were criminal offenses specific to “marijuana” left in the chapter of NRS that
17 regulates “controlled substances” and over which the Board is granted regulatory
18 authority?⁷

19 Once again, the Board respectfully submits that it has, at a minimum, made “a
20 substantial case on the merits” with regard to these two important issues of first
21 impression, and that the balance of equities and interests of the public at large weigh in
22 favor of granting a stay. *See Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960,
23 129 S. Ct. 2275, 2276 (2009) (citations omitted).

24
25 ⁶ See 2019 Nev. Stats. ch. 595 §§ 1-246 at 3767-3896.

26 ⁷ See, e.g., NRS 453.336(4) and (5) (possession of less than 50 pounds of marijuana
27 or less than one pound of concentrated cannabis); NRS 453.339 (trafficking of marijuana);
28 NRS 453.3393 (production of marijuana); NRS 453.401(3) (conspiracy to unlawfully possess
more than 1 ounce of marijuana).

EXHIBIT 1

1 **DECL**

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13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 CANNABIS EQUITY AND INCLUSION
16 COMMUNITY (CEIC), a domestic
17 nonprofit corporation; ANTOINE POOLE,
18 an individual,

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

Hearing Date: January 9, 2023

Hearing Time: 9:00 AM

25 **DECLARATION OF CAPTAIN JOSHUA BITSKO**
26 **IN SUPPORT OF MOTION TO STAY JUDGMENT AND ORDER PENDING**
27 **APPEAL**

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resort corridor a safer place. As a result of the Court's ruling, these activities would no longer be felony offenses.

8. A temporary stay of the Court's Order will allow LVMPD to continue to patrol the Las Vegas resort corridor as it is currently doing until an appellate court is able to review the ruling. It is Declarant's fear that a cessation of this patrol activity will result in more frequent incidents of firearms and weapons being brought to the Las Vegas resort corridor.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

EXECUTED this 28th day of December 2022.

Signature 
Joshua Bitsko

ORDR

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CANNABIS EQUITY AND INCLUSION
COMMUNITY (CEIC), a domestic nonprofit
corporation; ANTOINE POOLE, an individual,

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W

Department: 15

**ORDER DENYING
RESPONDENT'S/DEFENDANT'S
MOTION TO STAY JUDGMENT
AND ORDER PENDING APPEAL**

This matter having come before this court on January 9, 2023, on Respondent/Defendant Nevada Board of Pharmacy's (herein after "the Board") Motion to Stay Judgment and Order Pending Appeal; Sadmira Ramic, Esq., and Christopher Peterson, Esq., of the American Civil Liberties Union of Nevada, appearing on behalf of Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (CEIC) and Antoine Poole; Brett Kandt, Esq. and Peter Keegan, Esq., of the Nevada Board of Pharmacy appearing on behalf of the State of Nevada; the Court having reviewed the papers and pleadings on file herein, having heard the oral arguments of counsel, and with good cause appearing, the Court hereby finds, concludes, and orders as follows:

1 **FINDINGS OF FACT**

2 On April 15, 2022, Petitioners filed their petition for writ of mandamus, in which
3 Petitioners requested that the Court prevent the Nevada Board of Pharmacy from (1) scheduling
4 cannabis as a Schedule I substance in violation of the Nevada Constitution and (2) cease regulating
5 cannabis as, following the passage of NRS Title 56, cannabis now falls outside the Board’s
6 authority.

7 On June 7, 2022, the Board filed a Motion to Dismiss the Petition for Writ of Mandamus
8 and Complaint for Declaratory and Injunctive Relief. The Court issued an order denying the
9 Motion on July 26, 2022. Specially pertaining to this matter, the Court made a finding that:

- 10 1. CEIC had standing to seek writ relief because they suffered harm through the
11 expenditure of money and resources by assisting individuals with prior cannabis-
12 related criminal convictions in applying for pardons and sealing criminal records,
13 and they served as a representative of the public, thereby meeting the standard for
14 standing under the significant public importance doctrine as outlined in *Nev. Pol’y*
15 *Rsch Inst., Inc. v. Cannizzaro*, 507 P.3d 1203.
- 16 2. Antoine Poole had standing to seek writ relief because he was adjudicated guilty in
17 the Eighth Judicial District Court of the State of Nevada of Possession of Controlled
18 Substance, a Category E Felony pursuant to NRS 453.336, for possession of
19 marijuana. This adjudication occurred after cannabis was legalized for both medical
20 and recreational use in Nevada.

21 On October 26, 2022, this Court found that the Board’s regulation of cannabis as a
22 Schedule I substance violated the Nevada Constitution and that the Board did not have the
23 authority to regulate substances regulated pursuant the NRS Title 56, which necessarily included
24 cannabis, effectively granting Petitioner’s petition.

25 In the Court’s Judgement and Order Granting Petition for Writ of Mandamus and Request
26 for Declaratory Relief, the Court made several findings of fact, incorporated herein, including:
27

- 1 1. In 1998, Nevada voted on and passed the *Nevada Medical Marijuana Act*, a ballot
2 initiative intended to amend the Nevada Constitution to legalize marijuana for
3 medical use in Nevada.¹ Successful passage of the *Nevada Medical Marijuana Act*
4 resulted in the addition of Article 4, Section 38, of the Nevada Constitution.
- 5 2. Article 4, Section 38 of the Nevada Constitution specifically refers to the use of
6 cannabis by a patient, upon the advice of a physician, for the treatment or alleviation
7 of various medical conditions, and authorizes appropriate methods for supply of the
8 plant to patients.
- 9 3. In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*,
10 which legalized possession of marijuana for recreational purposes.² In addition to
11 legalizing the use of cannabis for recreational purposes, the *Initiative* prescribed the
12 regulatory regime that would oversee the market for both recreational and medical
13 cannabis, naming the Nevada Department of Taxation as the prime regulatory
14 agency.
- 15 4. In 2019, the Nevada Legislature passed NRS Title 56, titled “Regulation of
16 Cannabis”, to codify and clarify the *Initiative*. In four chapters, NRS Chapters
17 678A-D, the Legislature created a comprehensive regulatory regime for the new
18 cannabis industry, tasking the Cannabis Compliance Board with heading the regime
19 while explicitly authorizing specific Nevada state agencies and subdivisions to
20 regulate all aspects of the cannabis industry. The Nevada State Board of Pharmacy
21 was not referenced in any capacity nor explicitly authorized to participate in the
22 regulatory regimes prescribed by the *Initiative* or NRS Title 56.
- 23 5. The Board categorizes marijuana, cannabis, and cannabis derivatives as Schedule I
24 substances under NAC 453.510. By classifying marijuana, cannabis, and cannabis

25 ¹ Scott McKenna, *Medical Marijuana Laws in the Silver State*, 6 Nevada Lawyer, Aug. 10, 2002.

26 ² *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
27 <https://www.nvsos.gov/sos/home/showdocument?id=3294>.

1 derivatives as Schedule I substances, the Board denies that marijuana has “accepted
2 medical use in treatment in the United States.”

3 6. Several Nevada Revised Statutes reference the scheduling classifications
4 designated by the Board to criminalize activities related to controlled substances.

5 Furthermore, this order incorporates by reference all other factual findings of the Judgment
6 and Order Granting Petition for Writ of Mandamus and Request for Declaratory Relief issued by
7 the Court on October 26, 2022.

8 On November 23, 2022, the Board filed a Notice of Appeal to the Nevada Supreme Court
9 from the Judgment and Order Granting Petition for Writ of Mandamus and Request for Declaratory
10 Relief entered on October 26, 2022. In conjunction with the notice, the Board filed a Motion to
11 Stay Judgment and Order Pending Appeal. The Board highlighted several steps it would have to
12 undertake to place cannabis back on the list of controlled substances if they are successful on
13 appeal, but nonetheless acknowledged that they are not prevented from doing so.

14 On December 7, 2022, Petitioners/Plaintiffs filed an Opposition to
15 Respondent’s/Defendant’s Motion to Stay Judgment and Order Pending Appeal. On December 30,
16 2022, Respondent/Defendant filed a reply to the opposition. The Board argued, for the first time
17 throughout the proceedings in this case, that if cannabis is removed as a controlled substance,
18 public safety would be at risk. To support this new connotation, it attached a declaration of Captain
19 Joshua Bitsko. Captain Bitsko declared that granting the motion to stay will permit LVMPD to
20 continue to charge individuals under controlled substances statutes in incidents involving
21 cannabis- something they now must cease doing because the Court’s judgment and order makes
22 such statutes unconstitutional as applied to cannabis.

23
24 **CONCLUSIONS OF LAW REGARDING IMMEDIATE RULING**

25 NRAP 8(c) outlines four factors that must be considered in determining whether a stay
26 should be granted: 1) whether the object of the appeal or writ petition will be defeated if the stay
27 is denied; 2) whether appellant will suffer irreparable or serious injury if the stay is denied; 3)

1 whether respondent/real party in interest will suffer irreparable or serious injury if the stay is
2 granted; and 4) whether appellant is likely to prevail on the merits of the appeal or writ petition.
3 No one fact carries more weight than the others. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248,
4 251 (2004).

5 Under the first factor, the object of the Board’s appeal will not be defeated if the Board’s
6 motion is denied. If the Board is successful in its appeal, the Board may undertake an
7 administrative process to place cannabis back on the Board’s list of controlled substances.

8 Under the second factor, the Board will not suffer irreparable or serious injury if the stay
9 is denied. *Fritz Hansen A/S v. Eighth Judicial Dist. Court* held that “mere injuries, however
10 substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are
11 not enough to show irreparable harm.” 116 Nev. 650, 6 P.3d 982 (2000). The process the Board
12 will have to undertake to place cannabis back on the list of controlled substances if successful on
13 appeal constitutes “mere injuries” described in *Fritz*, and therefore it does not constitute irreparable
14 harm. While under some circumstances the government’s interests may coincide with the interests
15 of the public, in this matter the Board’s interest does not reflect the interest of the public; the public
16 voted in a referendum to amend the Nevada Constitution to recognize that cannabis has value for
17 medical treatment in this state and then to enact a comprehensive regulatory regime to the govern
18 every aspect of cannabis usage in Nevada. The Board’s regulation of cannabis contravenes what
19 the Nevada voting public has stated its interest is.

20 Under the third factor, respondent CEIC will suffer irreparable harm if the stay is granted.
21 Unlike the Board, Respondent CEIC’s interests are the same as those of the public. The public
22 voted on and passed the *Nevada Medical Marijuana Act*, resulting in the amendment of Article 4,
23 Section 38 of the Nevada Constitution. Article 4, Section 38 of the Nevada Constitution
24 specifically recognizes that cannabis has accepted medical use in treatment in the United States.
25 In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*, which
26 legalized possession of marijuana for recreational purposes.³ The Nevada voting public explicitly

27 ³ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
<https://www.nvsos.gov/sos/home/showdocument?id=3294>.

1 stated its intentions through two ballot initiatives, and the fact that the Board's regulations
2 contravene the public's stated interests, is the strongest factor in the Court's decision to deny the
3 motion to stay.

4 Furthermore, if the stay is granted, individuals of the public will continue to be arrested,
5 incarcerated, and convicted under statutes triggered by the Board's unconstitutional regulation of
6 cannabis. The declaration of Captain Joshua Bitsko attached to Defendant's Reply on Motion to
7 Stay Judgment and Order Pending Appeal was improperly introduced as new evidence.
8 Notwithstanding the improper introduction of the declaration, its substance supports denial of the
9 motion to stay as it makes clear that the harm to the Petitioners is not merely speculative: the Las
10 Vegas Metropolitan Police Department will continue to arrest individuals for possession of
11 cannabis under circumstances where such possession only violates Nevada law if cannabis is
12 scheduled as a controlled substance.

13 Respondent Antoine Poole will also suffer irreparable harm if the stay is granted. The
14 Court's Judgement and Order Granting Petition for Writ of Mandamus and Request for
15 Declaratory Relief does not nullify the conviction of Mr. Poole and those similarly situated, but
16 the Court's ruling does provide legal remedies that Mr. Poole would otherwise not be able to
17 pursue if the motion to stay is granted.

18 Under the fourth factor, the Board is not likely to prevail on the merits of the case for the
19 reasons stated in the Court's Judgement and Order Granting Petition for Writ of Mandamus and
20 Request for Declaratory Relief.

21 For the foregoing reasons, the Court denies the Board's Motion to Stay Judgment and Order
22 Pending Appeal.
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ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Respondent's/Defendant's Motion to Stay Judgment and Order Pending Appeal is Denied.

Dated this 8th day of February, 2023



~~IT IS SO ORDERED this ___ day of January 2023.~~

218 E08 4581 3149

Joe Hardy

~~District Court Judge~~

HONORABLE JUDGE JOE HARDY JR.

Respectfully submitted by:

Approved as to form and content by:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

NEVADA BOARD OF PHARMACY

/s/ Sadmira Ramic

/s/ Peter K. Keegan

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Cannabis Equity and Inclusion
7 Community, Plaintiff(s)

CASE NO: A-22-851232-W

8 vs.

DEPT. NO. Department 15

9 Nevada ex reL. Board of
10 Pharmacy, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
15 system to all recipients registered for e-Service on the above entitled case as listed below:

16 Service Date: 2/8/2023

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