

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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

Appellant,

v.

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

Respondents.

JOINT APPENDIX VOLUME I OF III

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ALPHABETICAL INDEX TO JOINT APPENDIX

DOCUMENT DESCRIPTION	Filed Date	VOLUME	PAGE NOS.
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Case Appeal Statement of Order Granting Attorney Fees and Costs	02/15/2023	III	357-360
Judgment and Order Granting Petition for Writ of Mandamus and Request for Declaratory Relief, October 26, 2022	10/26/2022	I	117-135
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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	04/15/2022	I	001-026

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DOCUMENT DESCRIPTION	Filed Date	VOLUME	PAGE NOS.
Respondent/Defendant's Answer to Petitioners/Plaintiffs' Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief	08/10/2022	I	088-105
Respondent/Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim	06/07/2022	I	027-039
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Respondent/Defendant's Opposition to Petitioners' Motion for Attorney Fees and Costs	11/23/2022	II	233-238
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Respondent/Defendant's Reply Memorandum of Points and Authorities on Motion to Stay Judgement and Order Pending Appeal	12/30/2022	III	257-268

CHRONOLOGICAL INDEX TO JOINT APPENDIX

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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	I	001-026
Respondent/Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim	06/07/2022	I	027-039
Petitioners'/Plaintiffs' Opposition to Respondent's/Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim	06/21/2022	I	040-067
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Case Appeal Statement of Order Granting Attorney Fees and Costs	02/15/2023	III	357-360

Respectfully submitted this 22nd day of June 2023.

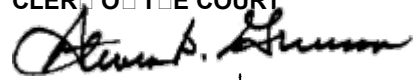
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on June 22, 2023.

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.

/s/ Peter Keegan
An Employee of the Nevada Board of
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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,

15 vs.

17 STATE OF NEVADA ex rel. BOARD OF
18 PHARMACY, a public entity of the State of
19 Nevada,
20 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**

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

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 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 ///

19
20
21
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 15. The court will generally exercise its discretion to consider an extraordinary writ
2 where an important legal issue that needs clarification is raised or to promote judicial economy
3 and administration.¹⁶

4 16. When a petition for extraordinary relief involves a question of first impression that
5 arises with some frequency, the interests of sound judicial economy and administration favor
6 consideration of the petition.¹⁷

7 **FACTS AND LEGISLATIVE HISTORY**

8
9 17. In 1923, the Nevada legislature banned marijuana¹⁸, making even simple
10 possession, regardless of purpose, a criminal offense.¹⁹

11 18. In 1971, the Nevada Legislature delegated its authority to regulate controlled
12 substances to the Nevada Board of Pharmacy under the Uniform Controlled Substances Act of
13 1971.²⁰

14 19. The Board categorized, and still categorizes, marijuana, cannabis, and cannabis
15 derivatives as Schedule I substances under NAC 453.510.

16
17 20. By classifying marijuana, cannabis, and cannabis derivatives as Schedule I
18 substances, the Board denies that marijuana has any medical value or can ever be dispensed to the
19 public at large for even medical use.

20 ///

21
22 ¹⁶ *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017).

23 ¹⁷ *A.J. v. Eighth Judicial District Court in and for County of Clark*, 2017, 394 P.3d 1209, 133 Nev. 202, quoting
Cote H. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 124 Nev. 36, 175 P.3d 906 (2008).

24 ¹⁸ “Marijuana” and “cannabis” are used interchangeably and have the same meaning. NRS 453.096 defines
25 marijuana as: “(a) All parts of any plant of the genus *Cannabis*, whether growing or not; (b) The seeds thereof; (c)
The resin extracted from any part of the plant; and (d) Every compound, manufacture, salt, derivative, mixture or
26 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.

27 ¹⁹ An Act to Regulate the Use, Supply and Possession of Narcotic Drugs in the State of Nevada, and to Provide
Penalties for the Violation Thereof, Nev. Compiled Laws §§ 5084-5085 (1929) (repealed 1937).

²⁰ NRS 453.146 (West 2019) (enacted 1971).

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
 the United States or lacks accepted safety for use in
 treatment under medical supervision.

7 (emphasis added).

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

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

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

16 _____
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 1. The legislature shall provide by law for:

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

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

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

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

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

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

26 26. In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*,
27 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 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.
10

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

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

19 45. Because the *Initiative* expressly stated that marijuana should be treated the same as
20 alcohol, and the Legislature specifically prohibited the Board from scheduling alcohol, it should
21 follow that the Board is also prohibited from scheduling marijuana, cannabis, and cannabis
22 derivatives.
23

24 ///

25 ///

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

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.

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

27 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).

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.

22 ///

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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,
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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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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
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 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
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 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 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**
 23 **ADMINISTRATIVE CODE § 453.510 AS SCHEDULE I SUBSTANCES AND**
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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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 Petitioners/Plaintiffs,

16 vs.

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

20 Respondent/Defendant.

Case No.:

Dept. No.:

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

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

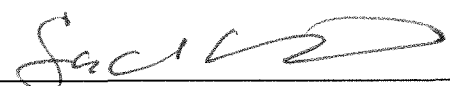
23 Cannabis Equity and Inclusion Community (CEIC) \$270.00

24 Antoine Poole \$30.00

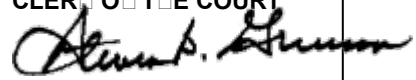
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26 **TOTAL REMITTED: \$300.00**

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DATED this 15th Day of April, 20 22



SADMIRA RAMIC, ESQ
Nevada Bar No. 15984
SOPHIA A. ROMERO, ESQ
Nevada Bar No. 12446
CHRISTOPHER M. PETERSON, ESQ.
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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

HEARING REQUESTED

**RESPONDENT/DEFENDANT’S MOTION TO DISMISS FOR LACK OF
JURISDICTION AND FAILURE TO STATE A CLAIM**

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 motion to dismiss Petitioners/Plaintiffs Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This motion is made pursuant to NRC 12(b)(1) and (b)(5) 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 Plaintiffs Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole
3 come to the Court seeking declaratory, injunctive and writ relief alleging that the deletion
4 of marijuana, cannabis and cannabis derivatives (hereinafter “marijuana”) from the list of
5 Schedule 1 controlled substances is mandated by passage of the *Nevada Medical Marijuana*
6 *Initiative*,¹ Nev. Const. art. IV, § 38, and the *Nevada Marijuana Legalization Initiative*,²
7 initially codified as the Regulation and Taxation of Marijuana Act (“Act”), NRS Chapter
8 453D.

9 This case should be dismissed pursuant to NRCP 12(b)(1) and (b)(5), because
10 Plaintiffs lack standing to challenge the current scheduling of marijuana in NAC 453.510,
11 and Plaintiffs have not set forth any remediable claims insofar as the current scheduling
12 of marijuana is lawful.

13 **I. BACKGROUND**

14 For decades, marijuana has been listed as a Schedule I controlled substance under
15 both the Federal Controlled Substances Act, 21 U.S. Code Chapter 13, and the Nevada
16 Uniform Controlled Substances Act, NRS Chapter 453. The *Nevada Medical Marijuana*
17 *Initiative* authorized the medical use of marijuana under limited circumstances and subject
18 to significant restrictions. The initiative was implemented by passage of Assembly Bill No.
19 453 in the 2001 Legislative Session, codified as NRS Chapter 453A. The *Nevada*
20 *Marijuana Legalization Initiative*, codified as NRS Chapter 453D, authorized the
21 regulation and taxation of marijuana for adult recreational use under limited
22 circumstances and subject to significant restrictions. By passage of Assembly Bill No. 533
23 in the 2019 Legislative Session, NRS Chapters 453A and 453D were repealed and replaced
24 in their entirety by Title 56 of the Nevada Revised Statutes. Certain acts falling within
25 the narrow confines of either NRS Chapter 678C (Medical Use of Cannabis) or NRS
26

27 ¹ Ballot Question No. 9, 1998 and 2000.

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

1 Chapter 678D (Adult Use of Cannabis) are exempt from State prosecution; otherwise,
2 marijuana remains an illegal substance under State law.

3 **II. LEGAL STANDARD**

4 “To survive dismissal, a complaint must contain some set of facts, which, if true,
5 would entitle [the plaintiff] to relief.” *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127
6 Nev. 196, 211, 252 P.3d 681, 692 (2011) (quotation marks omitted). The court must accept
7 the factual allegations of the Petition as true and draw all inferences in favor of Plaintiffs.
8 *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

9 **III. ARGUMENT**

10 **A. This Court lacks jurisdiction because the Plaintiffs lack standing.**

11 “Standing is the legal right to set judicial machinery in motion.” *Heller v. Legislature*
12 *of State of Nevada*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quotation marks omitted).
13 It is a jurisdictional requirement. *Id.* at 461, 93 P.3d at 749. Questions of standing can be
14 fatal to an action as they implicate the Court’s subject matter jurisdiction.

15 Where the Legislature has not provided a statutory right to seek relief, the Nevada
16 Supreme Court has long required "an actual justiciable controversy as a predicate to
17 judicial relief." *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385,
18 393, 135 P.3d 220, 225 (2006) (internal quotation marks omitted), abrogated on other
19 grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. at 227-28, 181 P.3d at 672.
20 *See also Kahn*, 127 Nev. at 213, 252 P.3d at 694, citing *Doe v. Bryan*, 102 Nev. 523, 525,
21 728 P.2d 443, 444 (1986). To demonstrate an actual controversy, a litigant must satisfy
22 the "standing requirements of injury, causation, and redressability." *Stockmeier*, 122 Nev.
23 at 392, 135 P.2d at 225 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112
24 S.Ct. 2130 (1992) .

25 Plaintiff Poole alleges he was convicted of a Category E felony for possession of
26 marijuana under NRS 453.336 over 5 years ago.³ Petition at 4:1-7 (¶1). Deleting marijuana

27 ³ NRS 453.336(4) imposes criminal penalties for the possession of 1 ounce or less of
28 marijuana not obtained lawfully pursuant to the provisions of title 56 of NRS.

1 as a Schedule 1 controlled substance at this time will do nothing to nullify his conviction.
2 Moreover, Poole has failed to even articulate in the Petition *when* the acts that resulted in
3 his conviction occurred or *how* those acts were somehow exempt from State prosecution as
4 a result of either ballot initiative.⁴ Poole lacks standing as he cannot demonstrate how a
5 favorable ruling would redress any injury. *See Lujan*, 504 U.S. at 560-61. “The injury must
6 ‘fairly traceable’ to the conduct at issue.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*
7 *(TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 704 (2000) (citing *Lujan, supra.*).

8 Plaintiff CEIC argues that it has both organizational and associational standing but
9 fails to plead the essential elements of either. To establish organizational standing CEIC
10 must show that the challenged conduct frustrated its organizational mission and that it
11 diverted resources to combat that conduct. *Friends of the Earth v. Sanderson Farms, Inc.*,
12 992 F.3d 939, 942 (9th Cir. 2021). CEIC alleges a disjointed, two-fold mission: “supporting
13 people from underrepresented communities as they apply for licenses to participate in the
14 legal cannabis market” on the one hand, and “assisting individuals with prior cannabis-
15 related criminal convictions in applying for pardons and sealing criminal records” on the
16 other. Petition at 3:16-26 (¶1). This represents “business as usual” for CEIC, as it cannot
17 demonstrate how either prong of its mission has been frustrated as a direct result of
18 marijuana remaining a Schedule I controlled substance after passage of the ballot
19 initiatives. *Friends of the Earth*, 992 F.3d 942-43. CEIC cannot manifest a “concrete and
20 demonstrable injury to its activities – with the consequent drain on the organization’s
21 resources – that constitute[s] far more than simply a setback to the organization’s abstract
22 social interests.” *Am. Diabetes Ass’n v. United States Dep’t of the Army*, 938 F.3d 1147,
23 1154 (9th Cir. 2019) (citations omitted).

24 CEIC has likewise failed to demonstrate the elements of associational standing as
25 articulated by the U.S. Supreme Court:

26 An association has standing to bring suit on behalf of its members when its
27 members would otherwise have standing to sue in their own right, the

28 ⁴ Nor does explain why he did not take advantage of the marijuana pre-trial
diversion program under NRS 453.3363.

1 interests at stake are germane to the organization's purpose, and neither the
2 claim asserted nor the relief requested requires the participation of individual
members in the lawsuit.

3 *Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. at 704 (citations omitted). “The ultimate
4 consideration when determining whether an organization has associational standing is
5 whether it has a "personal stake in the outcome of the controversy.” *Am. Unites for Kids v.*
6 *Rousseau*, 985 F.3d 1075, 1097 (9th Cir. 2021) (citations omitted); *see also Donald J. Trump*
7 *for President v. Cegavske*, 488 F. Supp. 3d 993, 999 (D. Nev. 2020).

8 The Petition utterly fails to specify how “people from underrepresented
9 communities” applying “for licenses to participate in the legal cannabis market” have a
10 personal stake in deleting marijuana as a Schedule 1 controlled substance.

11 Additionally, as with Plaintiff Poole, descheduling marijuana at this time will have
12 no beneficial impact upon those CEIC members with prior cannabis-related criminal
13 convictions, who must continue to pursue pardons and/or sealing conviction records. The
14 Board does not exercise any of the functions in the criminal justice system that the Petition
15 seeks to impact; it has no role in arrests, prosecutions, pardons or sealing conviction
16 records. *See, e.g., Ctr. for Biological Diversity v. Exp.-Import Bank of the United States*,
17 894 F.3d 1005, 1013 (9th Cir. 2018) (plaintiff must establish that the requested relief could
18 alter third-party conduct in a way that redresses the injury).

19 The Petition’s lack of redressability in this regard is further evidenced in that, even
20 if it was not listed as a controlled substance, the unlawful possession, trafficking or
21 production of marijuana still remains a crime under NRS 453.336(4), NRS 453.339 and
22 NRS 453.3393, respectively. The prohibited acts in those statutes are the possession,
23 trafficking or production of marijuana, *not* of a controlled substance. By virtue of the lack
24 of redressability, CEIC can satisfy none of the three prongs of associational standing.

25 Plaintiffs are not entitled to declaratory, injunctive or writ relief due to their lack of
26 standing. They cannot establish a beneficial interest sufficient to pursue a mandamus
27 action since they will gain no direct benefit from issuance of a writ and suffer no direct
28 detriment if it is denied. *Heller*, 120 Nev. at 461, 93 P.3d at 750 (citations omitted). They

1 cannot establish either a justiciable controversy or a legally protectable interest as required
2 to obtain declaratory relief. *See UMC Physicians' Bargaining Unit of Nev. Serv. Emples.*
3 *Union, SEIU Local 1107 v. Nev. Serv. Emples. Union/SEIU Local 1107*, 124 Nev. 84, 92-
4 94, 178 P.3d 709, 714-16 (2008). Finally, “Plaintiffs lack standing to pursue injunctive
5 relief where they are unable to establish a ‘real or immediate threat’ of injury.” *Nicosia v.*
6 *Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citing *Los Angeles v. Lyons*, 461 U.S.
7 95, 111-12, 103 S. Ct. 1660, 1670 (1983)). Plaintiffs’ claims must be dismissed due to their
8 lack of standing.

9 **B. The Petition fails to state a claim because the current scheduling of**
10 **marijuana is lawful.**

11 Plaintiffs’ core argument is that the marijuana cannot remain a Schedule I
12 controlled substance after passage of the ballot initiatives. Both the premise and the
13 conclusion of that argument are wrong.

14 **1. Nothing in the express language of either ballot initiative**
15 **compels the deletion of marijuana from NAC 453.510.**

16 Although the proponents of either ballot initiative could have squarely addressed
17 the deletion of marijuana as a Schedule I controlled substance, both initiatives are silent
18 on the subject. To the contrary, both initiatives are framed to account for and distinguish
19 between the lawful and unlawful use of marijuana.

20 Subsection 2(a) of the *Nevada Medical Marijuana Initiative* states that Section 38
21 does not “[a]uthorize the use or possession of the [cannabis] plant for a purpose other than
22 medical or use for a medical purpose in public.” The implementing legislation subsequently
23 delineated the lawful acts that are exempt from State prosecution and other acts that are
24 not exempt.⁵

25 Section 4 of the *Nevada Marijuana Legalization Initiative* (initially codified as NRS
26 453D.100) specified that the Act does “not permit any person to engage in” and does “not
27

28 ⁵ See former NRS 453A.200-.210, *inclusive*, and NRS 453.300.

1 prevent the imposition of any civil, criminal, or other penalty” for certain enumerated acts.
2 Sections 6-8 of the Act (initially codified as NRS 453D.110-.130) delineated the lawful acts
3 that are exempt from State prosecution.

4 An exemption from State prosecution allows a person to avoid prosecution in State
5 courts for an act that *otherwise constitutes a criminal offence*. Courts have consistently
6 recognized this distinction specifically in the context of marijuana legalization legislation.
7 *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502, 121 S. Ct. 1711,
8 1724 (2001) (Steven, J., concurring); *Wilson v. Lynch*, 835 F.3d 1083, 1088 (9th Cir. 2016);
9 *United States v. Pickard*, 100 F.Supp.3d 981, 1010 (E.D. Cal. 2015); *Doe v. State ex rel.*
10 *Legislature of the 77th Session of Nev.*, 133 Nev. 763, 763-64, 406 P.3d 482, 483 (2017); *City*
11 *of Missoula v. Shumway*, 434 P.3d 918, 921 (Mont. 2019).

12 Plaintiffs contend that passage of *Nevada Medical Marijuana Initiative* by and of
13 itself establishes that marijuana has an “accepted medical use” that disqualifies it as a
14 Schedule I substance under the criteria set forth in NRS 453.166, and argue that this
15 creates a direct conflict between Nev. Const. art. IV, § 38, and NAC 453.510. Petition at
16 11:16-22 (¶¶ 38-39). In upholding the Board’s authority to schedule controlled substances,
17 the Nevada Supreme Court has noted that statutes and regulations “should be construed,
18 if reasonably possible, so as to be in harmony with the constitution.” *Sheriff, Clark Cty. v.*
19 *Luqman*, 101 Nev. 149, 154-55, 697 P.2d 107, 111 (1985) (citations omitted). “[A]n act is
20 presumed to be constitutional and will be upheld unless the violation of constitutional
21 principles is clearly apparent.” *Id.* Plaintiffs have contrived a conflict where none exists,
22 since the Board must consider scientific evidence, *not* popular opinion, when evaluating a
23 substance’s accepted medical use. NRS 453.146(2).⁶

24
25 ⁶ Certain drugs containing cannabinoids that have been approved by the U.S. Food
26 and Drug Administration have been descheduled by the Board and are no longer controlled
27 substances. *See* LCB File No. R090-21, 12-29-2020. Additionally, one form of dronabinol,
28 a synthetic cannabinoid approved by the U.S. Food and Drug Administration, has been
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 Plaintiffs next conflate precatory language in Section 2 of *Nevada Marijuana*
2 *Legalization Initiative* stating that “marijuana should be regulated in a manner similar to
3 alcohol” with the prohibition on scheduling distilled spirits, wine, malt beverages or tobacco
4 set forth in NRS 453.2186(1) to argue that with the initiative’s passage, descheduling
5 marijuana was a *fait accompli*. Petition at 12:16-23 (¶¶ 44-45). Such an interpretation
6 would render Sections 4 and 6-8 of the ballot initiative meaningless and impermissibly
7 thwart the will of the electorate. *See Torvinen v. Rollins*, 93 Nev. 92, 94, 560 P.2d 915, 917
8 (1977); *see also City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114,
9 121, 251 P.3d 718, 722 (2011) (“this court will not read statutory language in a manner that
10 produces absurd or unreasonable results.”).

11 Plaintiffs also assert that since the *Nevada Marijuana Legalization Initiative* placed
12 regulatory authority for the Act with the Nevada Department of Taxation (subsequently
13 transferred to the Cannabis Compliance Board by Assembly Bill No. 533 in the 2019
14 Legislative Session), this abrogated the Board’s authority to schedule marijuana under
15 NRS Chapter 453. Petition at 13:1-4 (¶¶46-47). Once again, Plaintiffs make a quantum
16 leap of logic since the Act makes no reference to NRS Chapter 453 whatsoever. The two
17 administrative agencies occupy different roles and both exercise a limited, specific level of
18 regulatory oversight over marijuana in a manner that neither overlaps nor conflicts.

19 NRS Chapter 453 still governs the unlawful possession, trafficking or production of
20 marijuana, with measured carve-outs for the legitimate activities originally authorized by
21 the ballot initiatives and now codified in Title 56 and regulated by the Cannabis
22 Compliance Board. “[W]henver possible, a court will interpret a rule or statute in
23 harmony with other rules or statutes.” *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989
24 P.2d 870, 877 (1999) (citations omitted). Nothing in the text of the ballot initiatives can be
25 reasonably construed to have overridden the scheduling of marijuana in NAC 453.510 or
26 to have divested the Board of its authority to schedule marijuana in conformance with NRS
27 Chapter 453.

1 **2. The Nevada Legislature has not taken any action to deschedule**
2 **marijuana.**

3 The Nevada Legislature could have deleted marijuana as a Schedule I controlled
4 substance when enacting or amending legislation implementing the ballot initiatives yet
5 has never done so. Section 35 of Assembly Bill No. 453 in the 2001 Legislative Session
6 (codified as NRS 453.005) originally stated “The provisions of this chapter do not apply to
7 the extent that they are inconsistent with the provisions of chapter 453A of NRS.” NRS
8 453.005 was then amended by Section 214 of Assembly Bill No. 533 in the 2019 Legislative
9 Session to state: “The provisions of this chapter do not apply to the extent that they are
10 inconsistent with the provisions of title 56 of NRS.” However, neither bill, nor any of the
11 other intervening legislation that significantly amended NRS Chapter 453A, addressed the
12 scheduling of marijuana or repealed the criminal offenses specific to marijuana.⁷

13 The current scheduling of marijuana in NAC 453.510 also comports with federal law
14 and the plain language of NRS 453.2182: “If a substance is designated . . . as a controlled
15 substance pursuant to federal law, the Board shall similarly treat the substance.”
16 Plaintiffs also disregard the statute’s express mandate that, in the absence of any objection,
17 the Board shall designate a Schedule I controlled substance consistent with federal law
18 without making the findings required by NRS 453.166.

19 It is reasonable to conclude that the continued scheduling of marijuana in NAC
20 453.510 is consistent with legislative intent. “[A]cquiescence by the legislature . . . may be
21 inferred from its silence during a period of years.” *Oliver v. Spitz*, 76 Nev. 5, 9, 348 P.2d
22 158, 160 (1960), cited with approval in *Imperial Palace, Inc. v. State, Dept. of Taxation*, 108
23 Nev. 1060, 1068, 843 P.2d 813, 818 (1992). Plaintiffs are asking the Court to disrupt the
24 existing statutory scheme. “Courts should avoid hypertechnical constructions that
25 frustrate legislative intent.” *Heath v. Kiger*, 176 P.3d 690, 693 (Ariz. 2008) (citations
26 omitted). Their wish should not be granted.

27 ⁷ See AB 130 (2003 Session); AB 519 (2005 Session); AB 538 (2009 Session); SB 374
28 (2013 Session); SB 447 (2015 Session); AB 422 (2017 Session); SB 487 (2017 Session).

1 **3. Plaintiffs may petition the Board pursuant to NAC 639.140 to**
2 **review the scheduling of marijuana.**

3 Mandamus is not appropriate in insofar as Plaintiffs may petition pursuant to NAC
4 639.140 to have the current listing of marijuana as a Schedule I controlled substance
5 reviewed by the Board. *See, e.g., Cty. of Washoe v. Reno*, 77 Nev. 152, 155-56, 360 P.2d 602,
6 603-04 (1961) (“the fact that mandamus would give an easier or more expeditious remedy
7 is not the criterion.”). Plaintiffs must pursue this administrative remedy before seeking
8 judicial relief. “Ordinarily, before availing oneself of district court relief from an agency
9 decision, one must first exhaust available administrative remedies.” *Malecon Tobacco, Ltd.*
10 *Liab. Co. v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 839-41, 59 P.3d 474, 475-76 (2002)
11 (citations omitted); *see also Benson v. State Engineer*, 131 Nev. 772, 779, 358 P.3d 221, 226
12 (2015) (administrative proceedings are not futile solely because the statute prevents the
13 petitioner from receiving his or her ideal remedy).

14 The Board has regularly reviewed and amended the list of Schedule I substances in
15 NAC 639.510 since passage of the ballot initiatives.⁸ Never in that time have Plaintiffs
16 petitioned the Board.

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26 ⁸ *See* LCB File Nos. R001-01, 11-1-2001; R121-04, 8-25-2004; R181-07, 4-17-2008;
27 R156-10, 5-5-2011; R065-11, 2-15-2012; R023-12, 5-30-2012; R187-12, 2-20-2013; R015-13,
28 10-23-2013; R015-14, 10-24-2014; R142-14, 12-21-2015; R080-15 & R011-17, 10-31-2017;
R093-19, 6-8-2020; R090-21, 12-29-2020; R143-20, 4-14-2021; R023-21, 12-22-2021.

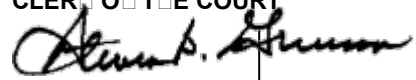
1 **IV. CONCLUSION**

2 For the foregoing reasons, Respondent/Defendant’s motion to dismiss should be
3 granted.

4 Respectfully submitted this 8th day of June, 2022.

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

7
8 By: /s/ Brett Kandt
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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.: A-22-851232-W

Department: 15

27 **PETITIONERS'/PLAINTIFFS' OPPOSITION TO RESPONDENT'S/DEFENDANT'S**
MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A
CLAIM

28 The Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community ("CEIC") and
29 Antoine Poole, by and through counsel Sadmira Ramic, Esq., Christopher M. Peterson, Esq., and
30 Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, pursuant to EDCR
31 2.20, hereby submit this motion in opposition to Respondent's/Defendant's Motion to Dismiss

1 Petitioners/Plaintiffs’ Petition for Writ of Mandamus and Complaint for Injunctive and
2 Declaratory Relief.

3 **I. INTRODUCTION**

4 As a preliminary matter, the Writ portion of this matter is governed by NRS Chapter 34.¹
5 Under NRS 34.210 the adverse party may only show cause by filing an answer made under oath:
6 “the party on whom the writ or notice shall have been served may show cause by answer under
7 oath, made in the same manner as an answer to a complaint in a civil action.” NRS 34.210. As
8 such, a Motion to Dismiss is an improper responsive pleading and is not contemplated under the
9 governing statutory scheme. Respondent in this matter has failed to file an “answer under oath” in
10 response to Petitioners’ Writ of Mandamus, therefore this Court should proceed pursuant to NRS
11 34.260, which states: “If no answer be made, the case shall be heard on the papers of the
12 applicant.”²

14 Petitioners’ request for writ relief is based on the Board’s continued failure to remove
15 cannabis and cannabis derivatives as Schedule I substances which violates the Nevada Constitution
16 and NRS 453.166. Pursuant to NRS 453.166, the Board may only designate a substance as a
17 Schedule I substance if it determines that the substance “has high potential for abuse *and* has no
18 accepted medical use in treatment in the United States or lacks accepted safety for use in treatment
19 under medical supervision.” In 1998, the Nevada voters made the factual determination that
20 cannabis had medical use and required its distribution, which was codified in Article 4, Section 38
21 of the Constitution of the State of Nevada. This codification settled any potential factual dispute
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25 ¹ The Nevada Supreme Court has stated that “until a particular issue is actually litigated and adjudicated, parties are
26 free to make alternative or inconsistent allegations regarding that issue.” *Mallin v. Farmers Ins. Exch.*, 108 Nev.
27 788, 806, 839 P.2d 105, 117 (1992), which is the basis for filing both a Petition for Writ of Mandamus and,
alternatively, a Complaint for Injunctive and Declaratory Relief.

² If an answer is filed, then the Court may order that the Petitioner file a reply (NRS 34.260), which would have been
the appropriate procedure here.

1 as to the medical use of cannabis. The Board, which is created under and subject to the laws of the
2 State of Nevada, cannot make any determination that contradicts state law, especially that of our
3 most fundamental governing document, the Constitution of the State of Nevada.³

4 Because the Board is acting in direct contradiction with the Nevada Constitution and
5 Nevada law, Petitioners are seeking a Writ from the Court that: 1) the classification of marijuana,
6 cannabis, and cannabis derivatives as Schedule I substances violates Article 4, Section 38, of the
7 Nevada Constitution and NRS 453.166; 2) the Board acted outside of its authority, and in direct
8 contradiction with the Constitution of the State of Nevada and NRS 453.166 when it classified, or
9 failed to remove, marijuana, cannabis and cannabis derivatives from the Schedule I list of
10 substances; and 3) the Board must remove language designating marijuana, cannabis, and cannabis
11 derivatives as Schedule I substances under NAC 453.510.
12

13 **II. STANDARD OF REVIEW**

14 **A. Standing**

15 The question of standing concerns whether the party seeking relief has a sufficient interest
16 in the litigation.⁴ The primary purpose of this standing inquiry is to ensure the litigant will
17 vigorously and effectively present his or her case against an adverse party.⁵
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23 ³ In Nevada, the power to define what conduct constitutes a crime lies exclusively within the power and authority of
24 the legislature. However, the legislature may delegate the power to determine the facts or state of things upon which
25 the law makes its own operations depend to an administrative agency. In doing so, the Legislature must outline suitable
26 standards that the administrative agency must follow in exercise of the delegated powers. The agency's determination
27 of the facts is what makes the statute effective, but it can only do so within the parameters of existing law. *Sheriff,
Clark County v. Luqman*, 101 Nev. 149 (1985).

⁴ See *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983) (citing *Harman v. City & Cty. of San Francisco*,
7 Cal. 3d 150, 101 Cal. Rptr. 880, 496 P.2d 1248, 1254 (Cal. 1972) ("The fundamental aspect of standing is that it
focuses on the party seeking to get his complaint before a . . . court.")).

⁵ See *Harman*, 496 P.2d at 1254. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

1 **1. Petition for Writ of Mandamus**

2 A writ of mandamus is available to compel a legal duty to act. NRS 34.160. When
3 evaluating a petitioner’s standing in a mandamus proceeding, state courts are not bound by federal
4 standing principles, which derive from the case or controversy component of the United States
5 Constitution.⁶ Because the Nevada Constitution does not contain a “case or controversy” clause,
6 the doctrine of standing is not a constitutional command but rather merely a judicially-created
7 doctrine of convenience.⁷ Nevada courts have consistently held that to establish standing in a
8 mandamus proceeding, the petitioner must demonstrate a beneficial interest in obtaining writ
9 relief.⁸ A party has a beneficial interest sufficient to pursue a mandamus action if the petitioner
10 will gain a direct benefit from its issuance and suffer direct detriment if it is denied.⁹

11 **2. Complaint for Injunctive and Declaratory Relief**

12 While “state courts do not have constitutional Article III standing, Nevada has a long
13 history of requiring an actual justiciable controversy as a predicate to judicial relief. Thus, to
14 pursue a legal claim, an ‘injury in fact’ *must exist*. ”¹⁰ Specifically, there must be “an invasion of
15 a judicially cognizable interest” that is “concrete and particularized.”¹¹ The injury must also be
16 “actual or imminent,” rather than merely “conjectural or hypothetical.”¹²

17 Nevada courts have held that a justiciable controversy is necessary for relief.¹³ A
18 justiciable controversy exists if: (1) there is a controversy in which a claim of right is asserted
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24 ⁶ *Heller v. Legislature of Nev.*, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004).

25 ⁷ *In re Amerco Derivative Litigation*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011).

26 ⁸ *See Heller*, 120 Nev. at 456; *State Bd. of Parole Comm’rs v. Second Judicial Dist. Court*, 451 P.3d 73.

27 ⁹ *Id.*

¹⁰ *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

¹¹ *Id.*

¹² *Id.*

¹³ *See Kress v. Corey*, Nev. 1; *Doe v. Bryan*, 102 Nev. 523.

1 against one who has an interest in contesting it; (2) the controversy is between persons whose
2 interests are

3 adverse; (3) the party seeking declaratory relief has a legal interest in the controversy; and
4 (4) the issue involved in the controversy is ripe for judicial determination.¹⁴

5 **B. NRCP 12(b)(5) – Failure to state a claim**

6 **1. Petition for Writ of Mandamus (NRS 34.150 – NRS 34.310)**

7 As discussed above, a Motion to Dismiss is an improper responsive pleading to a petition
8 for a writ of mandamus. The Writ portion of this matter is governed by NRS Chapter 34, and NRS
9 34.210 states that the adverse party may only show cause by filing an answer made under oath.
10 Respondent in this matter has failed to file an “answer under oath” in response to Petitioners’ Writ
11 of Mandamus, therefore this Court should hear the case on the papers of the applicant.”¹⁵

12 Assuming, arguendo, that the Court does not apply the statutory scheme of NRS 34.210,
13 and instead entertains the Motion to Dismiss, Respondent outlined the wrong legal standard for
14 the Court to apply when evaluating standing in a writ of mandamus proceeding.¹⁶

15 A writ of mandamus may be issued by the court “to compel the performance of an act
16 which the law especially enjoins as a duty resulting from an office, trust or station; or to compel
17 the admission of a party to the use and enjoyment of a right or office to which the party is entitled
18 and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or
19 person,” when there is no plain, speedy, and adequate remedy in the ordinary course.¹⁷ A writ of
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23 ¹⁴ *Id* at 525.

24 ¹⁵ If an answer is filed, then the Court may order that the Petitioner file a reply (NRS 34.260), which would have been
the appropriate procedure here.

25 ¹⁶ Mot. to Dismiss 4:4-8.

26 ¹⁷ *See* NRS 34.160; NRS 34.170, “[t]he writ may be issued by ... a district court or a judge of the district court, to
compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or
station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is
entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.
27 When issued by a district court or a judge of the district court it shall be made returnable before the district court.”

1 mandamus can require a board or official to affirmatively act in a manner which the law compels
2 that board or official to act.¹⁸

3 Writ relief is an extraordinary remedy, and therefore, it is within the court’s sound
4 discretion whether to grant such relief.¹⁹ “Extraordinary writ relief may be available where there
5 is no ‘plain, speedy and adequate remedy in the ordinary course of law.’”²⁰ Most importantly to
6 the current matter, a writ of mandamus is available to compel the performance of an act required
7 by law as a duty resulting from an office, trust, or station or to control an arbitrary or capricious
8 exercise of discretion.²¹ The court will generally exercise its discretion to consider an extraordinary
9 writ where an important legal issue that needs clarification is raised or to promote judicial economy
10 and administration.²²

12 **2. Complaint for Preliminary Injunction and Declaratory Relief**

13 NRCP 8(a) requires a pleading that states a claim for relief to contain:

14 (1) a short and plain statement of the grounds for the court’s jurisdiction,
15 unless the court already has jurisdiction and the claim needs no new
16 jurisdictional support;

17 (2) a short and plain statement of the claim showing that the pleader is
18 entitled to relief;

19 (3) a demand for the relief sought, which may include relief in the
20 alternative or different types of relief....²³

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24 ¹⁸ See *State v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002).

25 ¹⁹ *Segovia v. Eighth Judicial Dist. Court*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017).

26 ²⁰ *Id.* (quoting NRS 34.170 and NRS 34.330).

27 ²¹ NRS 34.160; *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

²² *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017).

²³ See also, *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977); and *Liston v. Las Vegas Metro. Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995).

1 A defendant is entitled to dismissal of a claim when a plaintiff “fail[s] to state a claim upon
2 which relief can be granted.”²⁴ A motion to dismiss a complaint for failure to state a claim should
3 not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts that
4 would entitle it to relief.²⁵ In considering the motion, the court must accept all of Plaintiff’s factual
5 allegations as true and construe them in Plaintiff’s favor.²⁶ However, courts “are not bound to
6 accept as true a legal conclusion couched as a factual allegation.”²⁷

7
8 The Nevada Supreme Court noted that, “pleadings should be liberally construed to allow
9 issues that are fairly noticed to the adverse party.”²⁸ Additionally, “A party may also state as many
10 separate claims or defenses as the party has regardless of consistency and whether based on legal
11 or on equitable grounds or on both.”²⁹ This rule is further advanced through a litany of case law.³⁰

12 A motion to dismiss must fail when the allegations set forth in a complaint are intelligible,
13 specific, and adequately apprise the Defendant of the substance of Plaintiff’s claims. Moreover,
14 NRCP 8 and NRCP 10 make clear that pleading in the alternative and seeking relief of several
15 different types is permissible. When tested by a subdivision (b)(5) motion to dismiss for failure to
16 state a claim upon which relief can be granted, the allegations of the complaint must be accepted
17 as true.³¹

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21 ²⁴ NRCP 12(b)(5).

22 ²⁵ *Pankopf v. Peterson*, 175 P.3d 910, 912, 124 Nev. Adv. Rep. 4 (2008) (citing *Vacation Village v. Hitachi America*,
110 Nev. 481, 484, 874 P.2d 744, 746 (1994)).

23 ²⁶ *Buzz Stew, LLC v. City of North Las Vegas*, 181 P.3d 670, 672 (Nev. 2008); *Morris*, 110 Nev. At 1276, 886 P.2d at
456.

24 ²⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Federal decisions involving the Federal Rules of Civil Procedure
provide persuasive authority when Nevada courts examine the Nevada Rules of Civil Procedure (or, as here, the
substantially similar Justice Court Rules of Civil Procedure). See, e.g., *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d
1252, 1253 (2005)).

25 ²⁸ *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997).

26 ²⁹ *Id.*

27 ³⁰ See *Union P. R.R. v. Adams*, 77 Nev. 282, 284, 362 P.2d 450, 451 (1961), stating “NRCP Rule 8(e)(2) [now NRCP
8(a)(3)] allow[s] a party to set forth two or more statements of the claim in one count or separate counts.”

³¹ *Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 587 P.2d 1331 (1978).

1 **III. SUMMARY OF THE ARGUMENT**

2 The Motion to Dismiss filed by Respondent cannot be used for the Writ portion of the
3 Petition as it is not the appropriate responsive pleading allowed under NRS Chapter 34. As such,
4 the court should proceed with the substance of Petitioner’s Writ as though no responsive pleading
5 was filed.³²

6 Plaintiffs/Petitioners have sufficient standing in this matter because Petitioners/Plaintiffs
7 CEIC and Antoine Poole will receive a direct benefit from cannabis and cannabis derivatives being
8 removed from the list of Schedule I substances, as will each and every Nevadan who uses cannabis
9 products.
10

11 Respondent’s Motion to Dismiss the Complaint for failure to state a claim must be denied
12 because Nevada is a notice pleading state (*see* NRCP 8(a)) and the Complaint for Declaratory and
13 Injunctive Relief specifically sets forth that Respondents’ act (failure to remove cannabis and
14 cannabis derivatives from the Schedule I list of substances) is in direct violation of the Constitution
15 of the State of Nevada (Article 4, Section 38) and Nevada law (NRS 453.166), therefore writ,
16 injunctive, or declaratory relief requiring the Board to act in a manner that conforms to Nevada
17 law are all appropriate remedies.
18

19 Respondent’s motion must be denied in its entirety because: 1) Petitioners/Plaintiffs have
20 standing to obtain writ relief because they will receive a beneficial interest from having cannabis
21 removed from Schedule I; 2) the Petitioners/Plaintiffs financial and personal interest will be
22 affected by the outcome of this case, and therefore have standing to seek declaratory and injunctive
23 relief 3) there exists no plain, speedy, and adequate remedy in the ordinary course of law, thus
24 extraordinary writ relief is appropriate and the Petition complies with the requirements of NRS
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26

27 ³² See NRS 34.210 and NRS 34.260.

1 Chapter 34; and 4) the Complaint for Injunctive and Declaratory Relief sets out clear and a clear
2 concise statement of facts, showing that Defendant is in violation of the Nevada Constitution and
3 Nevada state law, and asks for an appropriate remedy as required by NRCP 8(a).

4 **IV. ARGUMENT**

5 **A. Standing – As to Writ, Declaratory, and Injunctive Relief**

- 6 **1. Petitioner, Antoine Poole, will gain a direct benefit if cannabis is removed as a**
7 **Schedule I substance, because his conviction would be void under Nevada law, and**
8 **therefore he has standing to file a Petition for Writ of Mandamus and request**
9 **declaratory and injunctive relief.**

10 Mr. Poole was adjudicated guilty in the Eighth Judicial District Court of the State of
11 Nevada of *Possession of Controlled Substance*, pursuant to NRS 453.336 for possession of
12 marijuana. Respondent miscategorized Mr. Poole’s conviction when they stated that it was
13 pursuant to NRS 453.336(4), which imposes criminal penalties for the possession of 1 ounce or
14 less of marijuana not obtained lawfully pursuant to the provisions of title 56 of NRS.³³
15 Respondent’s confusion as to the categorization of Mr. Poole’s conviction, and the interplay
16 between the Board’s classification of cannabis and the criminalization of acts related to controlled
17 substances, goes to the heart of the issues in this case.

18 While the Nevada Legislature made it a crime to possess Schedule I controlled
19 substances,³⁴ the Board’s scheduling of the substances is what makes the statute effective. Thus,
20 when the Board schedules cannabis and cannabis derivatives as Schedule I substances, it triggers
21 the ability for individuals to be charged with Possession of a Controlled Substance under NRS
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24 ³³ Mot. to Dismiss 4: 25-28.

25 ³⁴ In 1971, the Nevada Legislature passed the Uniform Controlled Substances Act of 1971. It made it a crime to possess
26 a Schedule I controlled substance (with no intent to sell) and it delineated the level of punishment for violating the
27 statute.³⁴ At the same time, the Legislature delegated its authority to schedule controlled substances to the Nevada
Board of Pharmacy. (NRS 453.146 (enacted 1971)) It outlined various factors, as it is mandated to do, which are to
be taken into account by the Board when scheduling drugs as well as delineating the requirements by which a drug is
classified in an appropriate schedule. (*See* NRS 453.166; NRS 453.2186; and NRS 453.146.)

1 453.336(1). While NRS 453.366(4) does carve out possession of one ounce or less of marijuana
2 and prescribes a different categorical level of the offense, no such carve out exists for possession
3 over one ounce of marijuana. Thus, those individuals are currently being charged with the felony
4 level offense of Possession of a Controlled Substance.

5 Mr. Poole was charged and convicted of Possession of Controlled Substance, pursuant to
6 NRS 453.336(1)(2), for possessing marijuana. The events giving rise to the case occurred on May
7 20, 2016, and he was adjudicated guilty on April 20, 2017. His adjudication came after cannabis
8 was legalized medically in 2000 with the passage of the Nevada Medical Marijuana Act and the
9 Nevada Constitution was amended recognizing the medical value of cannabis and requiring its
10 distribution to individuals with certain illnesses. At the time of this Amendment, the Board should
11 have removed cannabis and cannabis derivatives from its list of Schedule I substances because the
12 prerequisite findings to be able to classify a substance as Schedule I i.e., that it has no medical
13 value or that it cannot be distributed safely, directly contradicted the Nevada Constitution. Because
14 cannabis and cannabis derivatives should have been removed from NAC 453.510 as Schedule I
15 substances, it follows that possession of cannabis should not have been a crime under NRS
16 453.336(1). Thus, Mr. Poole should never have been charged and convicted of a felony under NRS
17 453.336(1). Thus, Mr. Poole should never have been charged and convicted of a felony under NRS
18 453.336(1) for possessing marijuana.
19

20 Contrary to Respondent's argument³⁵, removing cannabis and cannabis derivatives from
21 the list of Schedule I controlled substances after finding that their inclusion on the list is
22 unconstitutional is the only remedy to overturn Mr. Poole's conviction.³⁶ Mr. Poole was convicted
23

24 ³⁵ Mot. to Dismiss 4-5: 28-1.

25 ³⁶ In footnote 4 in Respondent's Motion to Dismiss, Respondent states that Mr. Poole failed to explain why he did not
26 take advantage of the marijuana pre-trial diversion program under NRS 453.3363 and that this inaction somehow goes
27 against Mr. Poole having standing in a mandamus action. This assertion is not only irrelevant to the inquiry of standing,
but Respondent completely ignores that such a program must be offered by the prosecutor as part of a plea agreement,
and it must be approved by the presiding judge. Even more importantly, a full reading of NRS 453.3363, shows that

1 using a statute that would not be applicable to his case if cannabis was not classified as a Schedule
2 I substance. Because he was charged and convicted unconstitutionally, he has a beneficial interest
3 in obtaining writ relief. If the writ of mandamus is issued, his conviction will be deemed
4 unconstitutional, and it would have to be nullified. If it is denied, Mr. Poole will continue to suffer
5 the consequences of having a felony conviction on his record. Finally, Mr. Poole is an interested
6 party whose rights, status, or other legal relations are affected by statutes and regulations. Mr.
7 Poole was charged and convicted of Possession of Controlled Substance, pursuant to NRS
8 453.336(1)(2), for possessing marijuana. The statute under which he was convicted, as discussed
9 in detail above, is made operative and applicable to marijuana possession by the Board's
10 scheduling of cannabis as a Schedule I substance. The fact that he was arrested, charged, and
11 convicted under the statute is a clear legal interest in the controversy and the controversy involved
12 is ripe for judicial determination, therefore entitling him to seek declaratory and injunctive relief
13 regarding the Board's failure, and continued unwillingness to remove cannabis from Schedule I.³⁷
14

15
16 **2. CEIC will gain a direct benefit if cannabis is removed as a Schedule I substance, as**
17 **their mission directly relates to providing support to individuals seeking to**
18 **participate in Nevada's cannabis market, and therefore have standing to file a**
19 **Petition for Writ of Mandamus and request declaratory and injunctive relief.**

20 Respondent's argument that CEIC alleges a dis-jointed, two-fold mission is wrong as it
21 incorrectly frames Petitioners' statements from the Petition for Writ of Mandamus.³⁸ As it is

22 section 5 of the statute states: "A professional licensing board may consider a proceeding under this section in
23 determining suitability for a license or liability to discipline for misconduct. Such a board is entitled for those purposes
24 to a truthful answer from the applicant or licensee concerning any such proceeding with respect to the applicant or
25 licensee." If anything, Section 5 amplifies Mr. Poole's standing as even the completion of a diversion program would
26 render him dealing with the collateral consequences of a cannabis-related felony conviction that is unconstitutional.
27 ³⁷ See *Doe*, 102 Nev. 523 (ruling that appellants lacked standing to seek declaratory relief because they have never
been arrested for violating the statute in question nor was there any indication that appellants faced an immediate
threat of arrest for violation of the statute.); See also *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1973) (United
States Supreme Court declaring that an actual controversy is essential to judicial relief under the Federal Declaratory
Judgment Act and that the validity of criminal statutes may be assailed only if the threat of criminal prosecution is
not "imaginary or speculative.")

³⁸ Mot. to Dismiss 5: 12-16.

1 outlined in the Petition, CEIC advocates for freedom, equity, and opportunity in Nevada’s cannabis
2 market by supporting people from underrepresented communities as they apply for licenses to
3 participate in the legal cannabis market. In forming the organization, CEIC did not intend to help
4 individuals apply for pardons and seal their records, but rather in the course of providing support
5 to these individuals, CEIC recognized that some were unable to apply for licenses because of
6 cannabis related convictions. Because they could not fulfill their mission of providing support to
7 these individuals, CEIC had to divert their resources to help the apply for pardons and/or the
8 sealing of cannabis related records.
9

10 CEIC has a beneficial interest in obtaining writ relief. There is no doubt that the
11 organization will benefit from the writ’s issuance. For one, they will be able to cease spending
12 money, time, and resources, initially allocated for other matters, on helping individuals obtain
13 pardons or sealing their records. An order stating that the classification of cannabis and cannabis
14 derivatives as Schedule I substances is unconstitutional would nullify relative cannabis-related
15 convictions. As such, there would be no need to for these individuals to seek pardons and sealing
16 of their records to be able to apply for cannabis licenses. Secondly, such an order would open up
17 the number of eligible members that CEIC could help assist, given that cannabis-related
18 convictions impact a large number of underrepresented communities.³⁹
19

20 If the writ of mandamus is not issued, CEIC will suffer direct detriment not only
21 financially, but in its ability to carry out its mission of assisting underrepresented communities.
22

23 ///

24 ///

25 ³⁹ *The War on Marijuana in Black and White*, that examined arrests from 2000 to 2010, this report reveals that the
26 racist war on marijuana is far from over. More than six million arrests occurred between 2010 and 2018, and Black
27 people are still more likely to be arrested for marijuana possession than white people in every state, including those
that have legalized marijuana. <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

1 **a. Organizational Standing**

2 In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court found that
3 organizational standing exists if: 1) the organization’s mission was frustrated and 2) the
4 organization diverted its resources to identify or respond to a Respondent’s allegedly unlawful
5 actions. To satisfy the standing requirement, organizations must show that resources that could
6 have otherwise been spent on the organization’s goals were diverted to address the challenged
7 policy or practice.⁴⁰

8
9 CEIC’s mission as an organization is to provide support to individuals in underrepresented
10 communities as they apply for licenses to participate in the legal cannabis market. To carry out its
11 mission, CEIC participates in advocacy work to promote freedom, equity, and opportunity in
12 Nevada’s cannabis market, they assist individuals in applying for licenses needed to participate in
13 the cannabis market, and they provide information and resources to individuals in
14 underrepresented communities. While carrying out its mission, CEIC began to see repeated
15 patterns of individuals not qualifying for the licenses needed to participate in Nevada’s cannabis
16 market because of cannabis-related convictions. Because they could not fulfill their mission of
17 providing support to these individuals, CEIC had to divert their resources to help assist individuals
18 apply for pardons and/or sealing their record.

19
20 CEIC’s mission was further frustrated because cannabis-related convictions
21 disproportionately rendered underrepresented communities ineligible for licenses needed to be able
22 to participate in Nevada’s cannabis market.⁴¹ In *East Bay Sanctuary Covenant v. Garland*, 994

23
24 _____
⁴⁰ *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019).

25 ⁴¹ See NRS 678B.200 (2) (“When determining whether to approve an application to receive a license or registration
26 card, the Board may consider whether the applicant is:(a) A person of good character, honesty and integrity;(b) A
27 person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the
public interest of this State or to the effective regulation and control of cannabis, or create or enhance the dangers of
unsuitable, unfair or illegal practices, methods and activities in the conduct of cannabis-related activities or in the

1 F.3d 962 (9th Cir. 2021), a nonprofit organization that represented and assisted asylum seekers in
2 the United States and in Mexico brought suit in district court seeking an injunction against
3 enforcement of a new rule by Department of Justice and the Department of Homeland Security.
4 The rule denied asylum to aliens arriving at the U.S. border with Mexico unless they have first
5 applied for, and have been denied, asylum in Mexico or another country through which they have
6 traveled.⁴² Plaintiffs argued that the Rule “frustrated their mission of providing legal aid to
7 affirmative asylum applicants because it rendered ‘a large number’ of potential applicants
8 categorically ineligible for asylum and thus ‘significantly discourag[e]’ them from applying.”⁴³
9 The Ninth Circuit held that because the nonprofit organization assisted individuals in submitting
10 applications and the administrative rule rendered a large number of potential applicants ineligible,
11 there was a sufficient showing of frustration of the organization’s mission and the organization
12 had standing.⁴⁴ Similarly here, CEIC assists individuals in filing applications with the government
13 seeking a legal privilege, in this case a cannabis license. Individuals with certain cannabis-related
14 convictions are unable to obtain a license to be able to participate. Their ineligibility stems directly
15 from convictions under statutes which are made effective by the Board’s classification of cannabis
16 as a Schedule I substance. As such, CEIC’s mission is frustrated by the Board’s scheduling of
17 cannabis, and they have standing.
18
19

20 As outlined above, CEIC has a legal interest in the controversy and the issue involved in
21 the controversy is ripe for determination because the organization’s mission has been frustrated
22

23 carrying on of the business and financial arrangements incidental thereto; and (c) In all other respects qualified to be
24 issued a license or registration card consistently with the declared policy of the State”; *See also* Nevada Cannabis
25 Compliance Regulations (NCCR) Reg. 5.015(1)(e) “In addition to the considerations in NRS 678B.200 and NRS
26 678B.280, the Board may consider the following in determining whether any person qualifies to receive a license
under the provisions of chapter 678B of the NRS: The Board may consider any other qualifications or behavior of
the person that the Board determines is inconsistent with the declared policy of the State.”

27 ⁴² *Id.* at 968.

⁴³ *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 974-975.

⁴⁴ *Id.*

1 and it diverted its resources to identify and respond to Respondent’s allegedly unlawful actions.
2 Individuals continue to be prosecuted for violating Nevada statutes which rely on the scheduling
3 of marijuana, cannabis, and cannabis derivatives as Schedule I substances, and CEIC must
4 continue to expend resources remedying such actions. Identical to Mr. Poole, the Board has an
5 interest in contesting CEIC’s claim of right and is an adverse party in this controversy given that
6 they do not believe that their actions are unconstitutional and they do not want to remove cannabis
7 and cannabis derivatives from NAC 453.510.
8

9 ***b. Associational standing***

10 CEIC has associational standing in this matter because a) its members would otherwise
11 have standing to sue in their own right; b) the interests it seeks to protect are germane to the
12 organization’s purpose; and c) neither the claim asserted nor the relief requested requires the
13 participation of individual members in the lawsuit.⁴⁵

14 Some of CEIC’s members would have standing to sue in their own right because they have
15 been charged and convicted under cannabis-related statutes that are made operative and applicable
16 by the Board’s scheduling of cannabis as a Schedule I substance. These individuals sought to
17 participate in Nevada’s cannabis market and were unable to do obtain a license to do so because
18 of these convictions. Additionally, their participation in the lawsuit is not necessary.
19

20 As discussed in the previous sections, the interests CEIC seeks to protect are germane to
21 its purpose because they will be able to cease spending money, time, and resources, all initially
22 allocated for other matters, on helping individuals obtain pardons or sealing their records, and
23

24
25 ⁴⁵ “[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its
26 members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to
27 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 nullification of unconstitutional cannabis-related convictions would open up the number of eligible
2 members that CEIC could assist.

3 ***c. In the alternative, if the Court accepts the Board’s position that CEIC does not have***
4 ***organizational or associational standing, the organization likely has standing under***
5 ***the public-importance doctrine.***

6 CEIC has organizational and associational standing as long established in Nevada
7 jurisprudence. However, should the Court determine that it does not, the case should not be
8 dismissed because CEIC likely has standing under the public-importance standing exception as
9 described in *Nev. Pol’y Rsch Inst., Inc. v. Cannizzaro*, 507 P.3d 1203.

10 Public-importance standing traditionally applies when (1) the case presents "an issue of
11 significant public importance," (2) the case involves "a challenge to a legislative expenditure or
12 appropriation on the basis that it violates a specific provision of the Nevada Constitution," and (3)
13 the plaintiff is an "appropriate" party to bring the action.⁴⁶ However, the Nevada Supreme Court
14 has previously waived the expenditure requirement in the context of the Nevada Constitution’s
15 separation of powers clause.⁴⁷ Specifically, it did so because there were "clear threats to the
16 essential nature of state government guaranteed to . . . citizens under their [c]onstitution—
17 [specifically,] a government in which the three distinct departments, . . legislative, executive, and
18 judicial, remain within the bounds of their constitutional powers."⁴⁸ Ultimately the Court found
19 that the expenditure requirement would be waived, stating that a court “may apply the public-
20 importance exception in cases where a party seeks to protect the essential nature of "a government
21 in which the three distinct departments, . . . legislative, executive, and judicial, remain within the
22
23
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25

26 ⁴⁶*Nev. Pol’y Rsch Inst., Inc. v. Cannizzaro*, 507 P.3d 1203, 1207.

27 ⁴⁷*Id.*

⁴⁸*Id.* at 1208.

1 bounds of their constitutional powers, as against a public official, even when this requirement is
2 not met.”⁴⁹

3 While Separation of Powers provision of the Nevada constitution are not at issue here, the
4 fundamental principles are the same: is an executive branch department acting within the bounds
5 of its constitutional authority? The Board’s position in its Motion to Dismiss that it does not need
6 to comply with the will of the voters *even when that will is manifested in the Nevada Constitution*
7 *pursuant to a lawful referendum* make clear that the Board is acting beyond its constitutional
8 boundaries.
9

10 **B. Even if the Court permits the Board to avoid its obligation to file an answer pursuant**
11 **to the statutory scheme of NRS Chapter 34, the Petition for Writ of Mandamus and**
12 **Complaint for Declaratory and Injunctive Relief are plead sufficiently to survive a**
13 **motion to dismiss for failure to state a claim.**

14 **1. There exists no plain, speedy, and adequate remedy in the ordinary course of law**
15 **and thus extraordinary writ relief is appropriate and the Petition filed herein meets**
16 **the requirements of NRS Chapter 34.**

17 Here, there is no plain, speedy and adequate remedy in the ordinary course of law. There
18 is no other method to challenge the Board’s misclassification of marijuana, cannabis, and cannabis
19 derivatives as Schedule I substances. Additionally, the constitutionality of the Board’s
20 classification of cannabis and cannabis derivatives in the wake of Article 4, Section 38 being added
21 to the Nevada Constitution is a matter of first impression. When a petition for extraordinary relief
22 involves a question of first impression that arises with some frequency, the interests of sound
23 judicial economy and administration favor consideration of the petition.⁵⁰ Given that individuals
24 in Nevada are still being charged with cannabis-related offenses that reference the classifications
25

26 ⁴⁹ *Id.*

27 ⁵⁰ *A.J. v. Eighth Judicial District Court in and for County of Clark*, 2017, 394 P.3d 1209, 133 Nev. 202, quoting *Cote*
H. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 124 Nev. 36, 175 P.3d 906 (2008).

1 designated by the Board, it is a matter that arises far too frequently, and consideration of the
2 petition is warranted.

3 In response to the Board's claim (that the Plaintiffs were obligated to contact the Board to
4 request an amendment to the list of Schedule I substances)⁵¹ there is no statute, case law or rule
5 that requires Plaintiffs to file a petition with the Board of Pharmacy to review the current listing
6 of cannabis as a Schedule I substance before seeking judicial relief. Respondent argues that
7 because Plaintiffs may petition the Board to review the scheduling of cannabis and they have not
8 done so, mandamus is not the proper remedy.⁵² However, the mere fact that other relief may
9 be available does not mean Petitioners are barred from seeking alternate remedies, such as a writ
10 of mandamus.⁵³ While petitioning the Board to remove cannabis as a Schedule I substance may
11 result in its removal, it would not resolve the core issue in this case which is the unconstitutionality
12 of scheduling them as Schedule I substances. The Nevada Supreme Court decision in *State Bd. of*
13 *Parole Comm'rs v. Second Judicial Dist. Court*, 451 P.3d 73, is comparable. There, the Parole
14 Board filed a petition for a writ of mandamus challenging the district court's decision to deny their
15 petition for modification of a parolee's sentence.⁵⁴ Respondents argued that a writ of mandamus
16 was not proper because the Petitioners had another remedy at hand; they could file an application
17 to the State Board of Pardons Commissioners asking them to commute the parolee's sentence and
18 thus achieve the result that the Parole Board sought in filing its petition.⁵⁵ However, the Court held
19 that an application to the Pardons Board does not provide a "remedy in the ordinary course of
20 law" because the Pardons Board cannot answer the legal question presented in the matter, as that
21
22
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25 ⁵¹ Mot. to Dismiss 11:3-5.

26 ⁵² Mot. to Dismiss 11:3-16.

27 ⁵³ *State ex rel. Armstrong v. State Bd. of Examiners*, 78 Nev. 495; *Mulford v. Davey*, 64 Nev. 506, 186 P.2d 360,
175 A.L.R. 1255; *State ex rel. Sears v. Wright*, 10 Nev. 167.

⁵⁴ *State Bd. of Parole Comm'rs*, 451 P.3d at 76.

⁵⁵ *Id.*

1 is a matter for the courts.⁵⁶ Similarly, here, even if the Board of Pharmacy has the authority to
2 remove cannabis from the list of Schedule I substances, it cannot answer the question of whether
3 its failure to do so is unconstitutional. Thus, filing a petition with the Board of Pharmacy to review
4 the current listing of cannabis as a Schedule I substance is not an adequate remedy in the course
5 of law.

6 Additionally, by its own admission, the Board has regularly reviewed the list of Schedule
7 I substances and made the decision not to remove or reschedule cannabis.⁵⁷ Requiring the
8 Petitioners/Plaintiffs to petition the Board to review the scheduling of cannabis would be absurd
9 considering that the Plaintiffs would be asking the Board to do what the Board claims it is already
10 doing.

11
12 **2. A declaration as to the unconstitutionality of the Board’s actions and/or an injunction**
13 **preventing further harm is appropriate relief, both of which are plead sufficiently to**
14 **survive a motion to dismiss.**

15 In Nevada, all one needs to survive a motion to dismiss for failure to state a claim is
16 sufficiently to put the opposing party on notice of the claims. The Nevada Supreme Court noted
17 that, “pleadings should be liberally construed to allow issues that are fairly noticed to the adverse
18 party.”⁵⁸ A motion to dismiss must fail when the allegations set forth in a complaint are intelligible,
19 specific, and adequately apprise the Defendant of the substance of Plaintiff’s claims. When tested
20 by a subdivision (b)(5) motion to dismiss for failure to state a claim upon which relief can be
21 granted, the allegations of the complaint must be accepted as true.⁵⁹

22 Here there is no question that: 1) NRS 453.166 requires that, for a drug to be considered a
23 “Schedule I” substance, there must be a high potential for abuse and no accepted medical use or
24

25
26 ⁵⁶ *Id.*

⁵⁷ Mot. to Dismiss 11: 14-15;26-28.

⁵⁸ *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997).

⁵⁹ *Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 587 P.2d 1331 (1978).

1 no accepted safety for use in treatment under medical supervision; 2) the Nevada Constitution,
2 specifically Article 4, Section 38, recognizes the medicinal benefits of cannabis and has done so
3 since 2000; and 3) the Board, in the intervening 20+ years since the medical value of cannabis has
4 been constitutionally recognized, has failed to remove cannabis and cannabis derivatives from the
5 list of Schedule I substances. Petitioners/Plaintiffs have sufficiently plead that this failure has
6 resulted in the Board violating the Constitution of the State of Nevada as well as NRS 453.166,
7 that Plaintiffs/Petitioners have a vested interest in ensuring that the Board stops this illegal
8 behavior, and have sought an appropriate remedy from this court, whether by writ, declaration, or
9 injunction, to order that the Board ceases this continued illegal behavior.
10

11 **C. While this Court should not address the underlying merits of this matter when ruling**
12 **on the Motion to Dismiss, Respondent’s arguments related to the merits of this matter**
13 **are unsupported by the plain language of the law or legislative history.**

14 When considering a Motion to Dismiss, the Court must accept the factual allegations of
15 the Petition as true and draw all inferences in favor of Plaintiffs, thus a discussion of the underlying
16 merits of the case is more appropriate for a Motion for Summary Judgment pursuant to NRC 56,
17 rather than a Motion to Dismiss. However, as Respondent/Defendant attempts to argue the
18 underlying merits of the current matter, in an abundance of caution Petitioners/Plaintiffs respond
19 as follows.

20 In its argument that “nothing in the express language of [the Nevada Medical Marijuana
21 Initiative] compels the deletion of marijuana from NAC 453.510,” Respondent at no point
22 discusses, cites, or mentions the language of Article 4, Section 38 of the Nevada Constitution.
23 Even more importantly, Respondent does not explain how its findings under NRS 453.166 used to
24 schedule cannabis and cannabis derivatives as Schedule I substances does not conflict with the
25 plain reading of Article 4, Section 38 of the Nevada Constitution. To support their argument,
26
27

1 Respondent cites to *Sheriff, Clark County v. Lugmann*, 101 Nev. 149 (1985) and claims that “the
2 Nevada Supreme Court has noted that statutes and regulations ‘should be construed, if reasonably
3 possible, so as to be in harmony with the constitution.’”⁶⁰ There are two things wrong with this
4 argument. First, Respondent took it upon themselves to insert “regulations” within this statement
5 when the Supreme Court of Nevada only used such a statement as it relates to statutes.⁶¹ It goes
6 without saying that regulations are not the same as statutes and Plaintiffs are not arguing that the
7 statutes passed by the legislature are unconstitutional. Second, it should be emphasized that the
8 presumption alluded to in the opinion applies “if reasonably possible.” Here, there is a direct
9 contradiction with the Nevada Constitution on its face. It is not reasonably possible to conclude
10 that such a contradiction is in harmony with the constitution.
11

12 The Respondent next contends that no conflict exists because “the Board must consider
13 scientific evidence, not popular opinion, when evaluating a substance’s accepted medical use.”⁶²
14 If Respondent is insinuating that voters in Nevada are merely stating public opinion and do not
15 hold the power to strip the Board of its authority to regulate cannabis, they would be wrong.
16 Nevada voters may initiate a ballot measure that is placed directly on the ballot for voters to accept
17 or reject.⁶³ If it passes in two consecutive elections, it becomes law.⁶⁴ The Nevada voters have the
18 power, whether by choosing their elected representatives or by directly amending the constitution
19 by ballot measure, to determine the laws that govern this state. As such, Nevada voters wield just
20 as much, if not more, power as the Legislature to take away the Board’s authority. It is clear that,
21 more than 20 years ago, Nevada voters made the factual determination that cannabis has medical
22
23
24

25 ⁶⁰ Mot. To Dismiss 8:16-19.

26 ⁶¹ *Sheriff, Clark County*, 101 Nev. at 154.

27 ⁶² Mot. to Dismiss 8: 21-23.

⁶³ See NRS Chapter 295.

⁶⁴ *Id.*

1 value and ordered its distribution, and that determination was codified at Article 4, Section 38 of
2 the Nevada Constitution, our highest governing document.

3 Petitioners/Plaintiffs’ assertions regarding the nature of their claims and the specific relief
4 being sought are clear throughout the Petition for Writ of Mandamus and Complaint for
5 Declaratory and Injunctive Relief. Under NRS 453.166, the Board may only designate a substance
6 as a Schedule I substance if it determines that the substance “has high potential for abuse *and* has
7 no accepted medical use in treatment in the United States or lacks accepted safety for use in
8 treatment under medical supervision.” (Emphasis added). The Board is mandated to review the
9 schedule annually and maintain a list of current schedules.⁶⁵ The Board has admitted to reviewing
10 the current schedules frequently and it chose not to remove cannabis and cannabis derivatives as
11 Schedule I substances. Article 4, Section 38, of the Nevada Constitution states that cannabis does
12 have medical value and it requires that it be distributed. This directly contradicts the Board’s
13 findings that cannabis does not have medical value or that it lacks safety for use in treatment under
14 medical supervision. Therefore, such action is unconstitutional.
15
16

17 **1. The Board exceeded its authority when it placed, or failed to remove, marijuana,
18 cannabis, and cannabis derivatives from NAC 453.510 as Schedule I substances.**

19 The Board’s authority to classify marijuana, cannabis, and cannabis derivatives was
20 stripped with the passage of the *Initiative to Regulate and Tax Marijuana* in two distinct ways.
21 First, the *Initiative* promulgated that marijuana should be “regulated in a manner similar to
22 alcohol.”⁶⁶ Under NRS 453.2186, the Board is prohibited from scheduling, and has no authority,
23 to regulate “distilled spirits, wine, [and] malt beverages.” Because the *Initiative* expressly stated
24 that marijuana should be treated the same as alcohol, and the Legislature specifically prohibited
25

26 ⁶⁵NRS 453. 211 (1)(a): “The Board shall review the schedule annually and maintain a list of current schedules.”

27 ⁶⁶ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
<https://www.nvsos.gov/sos/home/showdocument?id=3294>.

1 the Board from scheduling alcohol, it should follow that the Board is also prohibited from
2 scheduling marijuana, cannabis, and cannabis derivatives.

3 In interpreting this argument, Respondent incorrectly claims that Plaintiffs are connecting
4 the language in the *Initiative* and the language in NRS 453.2186 to conclude that “descheduling
5 marijuana was a fait accompli.”⁶⁷ The two statutes in conjunction do not equate to cannabis being
6 descheduled, but rather that the Board no longer had the authority to schedule cannabis at the time
7 Nevada’s Constitution was successfully amended. The removal of cannabis and cannabis
8 derivatives as Schedule I substances would flow from the Board’s lack of authority. Respondent
9 counters this logical connection by arguing that such an interpretation would render Sections 4 and
10 6-8 of the ballot initiative meaningless and impermissibly thwart the will of the electorate.⁶⁸
11 However, Respondent fails to appreciate that sections 4, 6, 7, and 8 are carve outs by the
12 Legislature specifically for cannabis and have nothing to do with the Board’s ability to schedule
13 substances or offenses that criminalize conduct relating to controlled substances. Rendering that
14 the Board no longer has the authority to regulate or schedule cannabis would have no impact on
15 these sections.
16
17

18 Looking beyond the brief reference made by Respondent to the Initiative, the enactment of
19 Sections 4, 6, 7, and 8 of the ballot initiative⁶⁹ actually serves as more evidence that the voters and
20 the Legislature did not intend for cannabis to remain a “controlled substance” under Board
21 regulation. For example, while Section 4 “does not prevent the imposition of any civil, criminal,
22 or other penalty for” certain enumerated acts (e.g. driving under the influence of marijuana,
23 possessing marijuana in prisons, etc.), the Initiative does not require marijuana to be a “controlled
24

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26 ⁶⁷ Mot. To Dismiss 9: 1-5.

⁶⁸ Mot. to Dismiss 9:5-10.

⁶⁹ See *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 substance” for the Legislature to make those enumerated actions illegal. To build upon this
2 example, the act described in Section 4, Subsection 1(c) is illegal under NRS 212.160. NRS
3 212.160(3) states:

4 A prisoner confined in an institution of the Department of Corrections, or any other
5 place where prisoners are authorized to be or are assigned by the Director of the
6 Department, who possesses a *controlled substance without lawful authorization or*
7 *marijuana or marijuana paraphernalia*, regardless of whether the person holds a
8 valid registry identification card to engage in the medical use of cannabis pursuant
9 to chapter 678C of NRS, is guilty of a category D felony and shall be punished as
10 provided in NRS 193.130. (Emphasis added).

11 Relying on the same canon of statutory interpretation as the Respondent, plain language of
12 NRS 212.160 indicates that the Legislature does not intend for marijuana to be a “controlled
13 substance” under the Board’s control, otherwise the language “or marijuana or marijuana
14 paraphernalia” would be superfluous.

15 Second, the *Initiative* made clear that the Nevada Department of Taxation, rather than the
16 Nevada Board of Pharmacy, has the authority to regulate cannabis in the community.⁷⁰ The
17 Legislature later confirmed this when it transferred authority to regulate marijuana from the
18 Department of Taxation to the Cannabis Compliance Board.⁷¹ Despite the Respondent’s belief that
19 the two administrative agencies occupy different roles that don’t overlap or conflict, the opposite
20 is true. The Board is making findings that cannabis either has no medical value or that it cannot be
21 distributed safely while the Cannabis Compliance Board is creating the scheme in which cannabis
22 can be safely distributed for both medical and recreational purposes.

23 ///

24 ///

25
26 ⁷⁰ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
27 <https://www.nvsos.gov/sos/home/showdocument?id=3294>. See also NRS 453D.200.

⁷¹ Nev. Legis. AB 533 Reg. Sess. 2019.

1 **2. The fact that the Legislature has not passed an express statute descheduling cannabis**
2 **and cannabis derivatives is irrelevant.**

3 The ability for the Legislature to remove cannabis and cannabis derivatives as Schedule I
4 substance when enacting or amending legislation, and their decision to not do so, does nothing to
5 negate the Board’s duty to abide by the Nevada Constitution when carrying out its duties. As such,
6 it is irrelevant in the analysis for a motion to dismiss.

7 Furthermore, the Legislature, by enacting NRS 453.166 already set forth the requirements
8 for the Scheduling system. Again, NRS 453.166 requires there be no medical value. There would
9 be no need for the Legislature to specifically pass legislation removing cannabis when cannabis
10 itself no longer fits into the already codified definition of a Schedule I substance.

11 **3. The Board is not mandated to follow the federal schedule when classifying a**
12 **controlled substance.**

13 Respondent relies on NRS 453.2182 to argue that because cannabis is still listed as a
14 Schedule I substance under federal law, the Board is required to follow suit. After a deeper dive
15 into NRS 453.2182 and its purpose, one can see that such a requirement does not exist for cannabis.
16 NRS 453. 2182 was passed in 1991 under the title, “Treatment by Board when substance is
17 designated, rescheduled, or deleted as a controlled substance by federal law.”⁷² It reads:

18
19 If a substance is designated, rescheduled or deleted as a controlled substance
20 pursuant to federal law, the Board shall similarly treat the substance
21 pursuant to the provisions of NRS 453.011 to 453.552, inclusive, after the
22 expiration of 60 days from publication in the Federal Register of a final
23 order designating a substance as a controlled substance or rescheduling or
24 deleting a substance or from the date of issuance of an order of temporary
25 scheduling under Section 508 of the federal Dangerous Drug Diversion
26 Control Act of 1984, 21 U.S.C. § 811(h), unless within the 60-day period,
the Board or an interested party objects to the treatment of the substance. If
no objection is made, the Board shall adopt, without making the
determinations or findings required by subsections 1 to 4, inclusive, of NRS
453.146 or NRS 453.166, 453.176, 453.186, 453.196 or 453.206, a final
regulation treating the substance. If an objection is made, the Board shall

27 ⁷² See NRS 453.2182.

1 make a determination with respect to the treatment of the substance as
2 provided by subsections 1 to 4, inclusive, of NRS 453.146. Upon receipt of
3 an objection to the treatment by the Board, the Board shall publish notice
4 of the receipt of the objection, and action by the Board is stayed until the
5 Board adopts a regulation as provided by subsection 4 of NRS 453.146.

6 When considering the title and the full text of the statute, one can see that this statute applies
7 to changes made to the federal schedule of controlled substances post 1991. Specifically, the
8 statute permits the Board or any other interested party to object to the treatment of the substance
9 within 60 days of its publication in the Federal Registrar. “Marihuana” was classified as a Schedule
10 I substance in Nevada with the passage of the Uniform Controlled Substances Act in 1971.⁷³ This
11 is decades before the passage of NRS 453.2182. This leaves no room for anyone to object as is
12 outlined in the statute. If this statute was applicable to substances scheduled prior to 1991, the
13 ability to object would be rendered meaningless.

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27 ⁷³ Legislative History of Assembly Bill 107 from 1971.
<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1971/AB107,1971.pdf>

1 **V. CONCLUSION**

2 Respondent’s motion must be denied in its entirety because: 1) Petitioners/Plaintiffs have
3 standing to obtain writ relief because they will receive a beneficial interest from having cannabis
4 removed from Schedule I; 2) the Petitioners/Plaintiffs financial and personal interest will be
5 affected by the outcome of this case, and therefore have standing to seek declaratory and injunctive
6 relief 3) there exists no plain, speedy, and adequate remedy in the ordinary course of law and thus
7 extraordinary writ relief is appropriate and the Petition complies with the requirements of NRS
8 Chapter 34; and 4) the Complaint for Injunctive and Declaratory Relief sets out clear and a clear
9 concise statement of facts, showing that Defendant is in violation of the Nevada Constitution and
10 Nevada state law, and asks for an appropriate remedy as required by NRCP 8(a).

11
12 DATED this 21st day of June 2022.

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

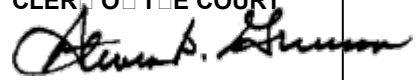
17 **AMERICAN CIVIL LIBERTIES**
18 **UNION OF NEVADA**

19 /s/ Sadmira Ramic
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 21st day of June 2022, I caused a true and correct copy of the
3 foregoing **PETITIONERS'/PLAINTIFFS' OPPOSITION TO RESPONDENT'S**
4 **/DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND**
5 **FAILURE TO STATE A CLAIM** to be electronically filed and served to all parties of record
6 via the Court's electronic filing system to all parties listed on the e-service master list.
7

8
9
10 /s/Courtney Jones
11 An employee of ACLU of Nevada
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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

Hearing Date: July 13, 2022

Hearing Time: 9:00 AM

**RESPONDENT/DEFENDANT'S REPLY MEMORANDUM OF POINTS AND
AUTHORTIES ON MOTION TO DISMISS FOR LACK OF JURISDICTION AND
FAILURE TO STATE A CLAIM**

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 dismiss Petitioners/Plaintiffs Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This reply is made pursuant to EDCR 2.20(g).

1 **I. INTRODUCTION**

2 Plaintiffs Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole
3 fail to rebut the crux of the Board’s motion: 1) that the *Nevada Medical Marijuana*
4 *Initiative*, Nev. Const. art. IV, § 38, does not compel the deletion of marijuana, cannabis
5 and cannabis derivatives (hereinafter “marijuana”) from the list of Schedule I controlled
6 substances; 2) that the *Nevada Marijuana Legalization Initiative* did not divest the Board
7 of jurisdiction over the scheduling of marijuana as a controlled substance; and 3) deleting
8 marijuana from Schedule I will not redress their alleged injuries. Plaintiffs’ opposition
9 largely deflects from these realities.

10 **II. ARGUMENT**

11 **A. A motion to dismiss is a proper responsive motion to a petition for**
12 **writ of mandamus.**

13 Plaintiffs initially throw a red herring by arguing that a motion to dismiss a writ
14 petition “is an improper responsive pleading and is not contemplated under the governing
15 statutory scheme.” Opposition at 2:9-10; 5:8-12. This belies the dictate of NRS 34.300 that
16 “[e]xcept as otherwise provided . . . the provisions of NRS and Nevada Rules of Civil
17 Procedure relative to civil actions in the district court are applicable to and constitute the
18 rules of practice in (mandamus) proceedings.” “[A] proceeding in mandamus, under our
19 practice act regulating the same, is a civil remedy, with the qualities and attributes of a
20 civil action.” *State ex rel. Bullion & Exch. Bank v. Mack*, 26 Nev. 430, 441, 69 P. 862, 863
21 (1902).

22 Furthermore, Plaintiffs stipulated to the Board filing a motion to dismiss prior to
23 filing an answer to the Petition in the First Stipulation and Order Setting Briefing
24 Schedule entered by the Court on June 1, 2022.

25 **B. Nev. Const. art. IV, § 38 does not compel the deletion of marijuana**
26 **from Schedule I.**

27 Nev. Const. art. IV, § 38(1)(a) mandates that “[t]he legislature shall provide by law
28 for . . . [t]he use by a patient, *upon the advice of his physician*, of a plant of the genus

1 Cannabis for the treatment or alleviation of” various medical conditions. (Emphasis
2 added). In the intervening twenty-two years since enactment the Legislature has never
3 deemed the deletion of marijuana from the list of Schedule I controlled substances
4 necessary to carrying out that constitutional mandate. Nev. Const. art. IV, § 38 itself is
5 predicated on the Legislature delineating between lawful and unlawful use. The will of
6 voters that marijuana be authorized for a patient’s medical use “upon the advice of a
7 physician” under limited circumstances and subject to significant restrictions has been
8 fully honored.

9 Plaintiffs do not allege that they have been prevented from using marijuana in
10 conformance with Nev. Const. art. IV, § 38. Rather, they mistakenly equate the right of a
11 patient to use marijuana “upon the advice of a physician” to marijuana having “accepted
12 medical use in treatment in the United States” to fabricate a conflict between Nev. Const.
13 art. IV, § 38 and NRS 453.166(2). They do so in a bid to have criminal convictions for
14 unlawful acts falling outside the scope of Nev. Const. art. IV, § 38 overturned.

15 However, the constitutional right to use marijuana “upon the advice of a physician”
16 in Nevada does not establish that marijuana has “accepted medical use in treatment in the
17 United States” that precludes its continued designation in Schedule I. Undoubtedly a
18 patient “is fully entitled to rely upon the physician's professional skill and judgment while
19 under his care.” *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Nevertheless,
20 on the national level all states recognize marijuana as a Schedule I controlled substance
21 under federal law, even as 37 states and the District of Columbia now authorize its medical
22 use.¹

23
24 ¹ Alabama Code Chapter 20 Article 2A; Alaska Stat. 17.37.10, et seq.; Arizona Rev.
25 Statutes 36-2801, et seq.; Arkansas Const. of 1874: Amendment 98, section 1, et seq.;
26 California Health and Safety Code: Section 11362.5, et seq.; Colorado Const. Article XVIII
27 14; Connecticut Gen. Statutes: Title 21A, Section 21a-408, et seq.; Delaware Code: Title 16,
28 Section 4901A, et seq.; D.C. Code Ann. 7-1671.01, et seq.; Florida Statutes: Title XXIX,
Section 381.986, et seq.; Hawaii Rev. Statutes: Section 329-121, et seq.; Illinois
Statutes: Chapter 410, Section 130/1, et seq.; Louisiana Rev. Statutes: Title 40, Section
1046, et seq.; Maine Rev. Statutes: Title 22, Section 2421, et seq.; Code of Maryland
Regulations: Chapter 10, Section 62.01, et seq.; Code of Massachusetts Regulations: 105

1 As previously noted, NRS 453.2182 mandates that, in the absence of any objection,
2 the Board *shall* designate a Schedule I controlled substance consistent with federal law
3 without making the findings required by NRS 453.166. Plaintiffs correctly point out that
4 marijuana was designated in Schedule I by the Legislature with enactment of the Uniform
5 Controlled Substances Act, codified as NRS Chapter 453, in 1971, prior to the enactment
6 of NRS 453.2182. Plaintiffs also correctly note that the Board is not mandated to follow
7 federal law when scheduling, rescheduling or deleting a controlled substance, provided the
8 Board makes the determinations required under NRS 453.146. Nevertheless, Plaintiffs
9 seek to circumvent this statutory administrative rulemaking process altogether through
10 their Petition.

11 In the intervening twenty-two years since the enactment of Nev. Const. art. IV, § 38
12 the Board has regularly reviewed and amended the list of Schedule I substances in NAC
13 639.510 in conformance with NRS 453.211. Never in that time have Plaintiffs – or *any*
14 party – objected to the listing of marijuana in Schedule I or otherwise petitioned the Board
15 pursuant to NAC 639.140 for reconsideration of the scheduling of marijuana in light of the
16 amendment to the Nevada Constitution.² Plaintiffs now would have the Court make
17 determinations that are legislatively delegated to the Board. *See Sheriff, Clark Cty. v.*
18 *Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Mandamus will not lie “when
19

20 CMR 725.001, et seq.; Michigan Compiled Laws: Chapter 333, Section 26421, et seq.;
21 Minnesota Statutes §§152.22-152.37; Mississippi Medical Cannabis Act, SB 2095 (2022);
22 Missouri Const. Article XIV; Montana Code Annotated: Title 50, Section 46-301, et seq.;
23 New Hampshire Rev. Statutes: Title X, Chapter 126-X.; New Jersey Statutes: Title 24,
24 Section 6I-1, et seq.; New Mexico Statutes: Chapter 26, Section 2B-1, et seq.; New York
25 Consolidated Laws: PBH Section 3360, et seq.; North Dakota Century Code: Title 19,
26 Section 24.1-01, et seq.; Ohio Rev. Code: Title XXXVII, Section 3796.01, et seq.; 63
27 Oklahoma Statutes Supp.2019, §§ 427.1--427.23; Oregon Rev. Statutes: Section 475B.400.;
28 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, Section 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.

² This refutes the notion that Plaintiffs have no plain, speedy, and adequate remedy
at law and calls into question their inexcusable delay in seeking redress.

1 the duty imposed requires deliberation and decision upon facts presented.” *Douglas Cty.*
2 *Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669, 671 (1962).

3 **C. The Nevada Marijuana Legalization Initiative did not divest the**
4 **Board of jurisdiction over the scheduling of marijuana as a controlled**
5 **substance.**

6 Plaintiffs’ ultimate motive is revealed in their argument that with the subsequent
7 passage of the *Nevada Marijuana Legalization Initiative* the Board was effectively divested
8 of jurisdiction over the scheduling of marijuana as a controlled substance altogether.
9 Petition at 10:11-15 (¶31); 12:13-14 (¶43); 15:5-7 (¶62); 16-18 (¶¶A and B); Opposition at
10 22:17-24:21. Plaintiffs’ 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.³

12 Despite Plaintiffs’ assertions to the contrary, under the current statutory scheme set
13 forth in Title 56 of the Nevada Revised Statutes, to the extent marijuana was legalized for
14 adult recreation use by the *Nevada Marijuana Legalization Initiative*, it is “regulated in a
15 manner similar to alcohol” consistent with Section 2 of that initiative. Regulatory oversight
16 and enforcement of the lawful use of marijuana authorized by both ballot initiatives now
17 lies with the Cannabis Compliance Board, even as the Board retains jurisdiction over the
18 scheduling of controlled substances under NRS Chapter 453.

19 Once again, the *Nevada Marijuana Legalization Initiative* itself delineated between
20 lawful and unlawful use. Once again, in the course of implementing and amending that
21 statutory scheme the Legislature has never deemed it necessary to deschedule marijuana
22 or divest the Board of its authority under NRS Chapter 453 to schedule marijuana. Once
23 again, the will of the voters that marijuana be authorized for adult recreational use under
24 limited circumstances and subject to significant restrictions has been fully honored. Once

25
26 ³ 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 again, Plaintiffs do not allege that they have been prevented from using marijuana in
2 conformance with the *Nevada Marijuana Legalization Initiative*. Once again, Plaintiffs
3 essentially seek a “Get Out of Jail Free” card that was never contemplated by either ballot
4 initiative.

5 **D. Granting Plaintiffs their requested relief will not redress their**
6 **alleged injuries.**

7 Plaintiffs repeatedly assert that the relief they seek is a writ or order directing the
8 Board to remove marijuana from the list of Schedule I controlled substances in NAC
9 453.510. Petition at 2:1-4; 13:8-10 (¶49); 14:20-21 (¶49); 15:1-10 (¶62); 16-18 (¶¶A and B);
10 Opposition at 3:11-12; 23:8-9. Plaintiffs essentially seek to decriminalize conduct clearly
11 proscribed by the Uniform Controlled Substances Act, a proposition previously rejected by
12 the Nevada Supreme Court in *Luqman*. 101 Nev. at 157, 697 P.2d at 112-13. Even so, this
13 will not redress their alleged injuries.

14 Plaintiffs allege that “individuals continue to be prosecuted for violating Nevada
15 statutes which rely on the scheduling of marijuana, cannabis and cannabis derivatives as
16 Schedule I substances.” Petition at 14:16-18 (¶59). However, several of the relevant
17 statutes do not even rely upon marijuana being scheduled as a controlled substance. NRS
18 453.339 prohibits the trafficking of marijuana specifically.⁴ NRS 453.3393 prohibits the
19 unlawful production of marijuana specifically.⁵ NRS 453.336(4) prohibits the unlawful
20 possession of 1 ounce or less of marijuana specifically.

21 NRS 453.336(1) prohibits the unlawful possession of *any* controlled substance and is
22 not limited to Schedule I. NRS 202.360 prohibits the unlawful possession of a firearm by

23
24 ⁴ NRS 453.339(1) states in pertinent part: “a person who knowingly or intentionally
25 sells, manufactures, delivers or brings into this State or who is knowingly or intentionally
26 in actual or constructive possession of *marijuana or concentrated cannabis* shall be
27 punished” (Emphasis added).

28 ⁵ NRS 453.3393(1) states in pertinent part: “A person shall not knowingly or
intentionally manufacture, grow, plant, cultivate, harvest, dry, propagate or process
marijuana, except as specifically authorized by the provisions of this chapter or chapter
453A of NRS.” (Emphasis added).

1 a person who “unlawfully” uses *any* controlled substance and is not limited to Schedule I;
2 moreover, the prohibition does not apply to a person “lawfully” using marijuana in
3 conformance with NRS Chapters 678C or 678D. These prohibitions apply to all controlled
4 substances, and persons convicted of these offenses will not benefit from a judicial
5 determination that the current listing of marijuana in Schedule I is unconstitutional.⁶

6 Plaintiff Poole’s alleged injury, that he was convicted of a controlled substance-
7 related offense after the enactment of Nev. Const. art. IV, § 38 (Petition at 4:1-6 (¶1; 6:1-4
8 (¶10), can only be redressed by descheduling marijuana altogether.⁷ Descheduling
9 marijuana altogether will not even fully redress the alleged injuries of those CEIC members
10 with prior criminal convictions for offenses specific to marijuana. By virtue of the lack of
11 redressability, these Plaintiffs lack standing.

12 **E. CEIC has failed to establish associational standing, organizational**
13 **standing or standing under the public-importance doctrine.**

14 Since CEIC members with prior marijuana-related criminal convictions cannot
15 establish standing in their own right, they cannot afford CEIC associational standing. The
16 Petition similarly fails to demonstrate the redressability necessary to establish standing
17 for CIEC’s members seeking to be licensed in the cannabis industry. The alleged injuries
18 to CEIC’s members are impermissibly generalized and CEIC’s interests are so marginally
19 related to the listing of marijuana as a Schedule I controlled substance that any
20 redressability to CEIC or its members by way of its requested relief remains speculative.
21 *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir.
22 2004).

23 ⁶ NRS 453.337 does prohibit the unlawful possession for the purpose of sale any
24 controlled substance classified in schedule I or II; however, the unlawful possession of
25 marijuana for the purpose of sale is clearly proscribed under both ballot initiatives and
implementing legislation.

26 ⁷ Poole alleges that May 20, 2016, was the date of his arrest for possession of
27 marijuana in violation of NRS 453.336 (Opposition at 10:5-7), *prior* to enactment of the
28 *Nevada Marijuana Legalization Initiative*; his subsequent conviction *after* enactment of
that ballot initiative is moot.

1 Plaintiffs reframe their statement of CEIC’s mission in their opposition in an effort
2 to salvage their argument that they have organizational standing. The Petition expressly
3 states that as part of its two-fold mission, in addition to assisting members of
4 underrepresented communities to become licensed in the cannabis industry:

5 CEIC has also dedicated resources to mitigating Nevada’s long history of
6 prosecuting cannabis-related offenses by assisting individuals with prior
7 cannabis-related criminal convictions in applying for pardons and sealing
8 criminal records. CEIC continues to engage in community outreach to identify
9 these individuals and organize record sealing workshops.

10 Petition at 3:21-24 (¶1).

11 The Petition does not allege that any of the individuals that CEIC assists in this
12 regard are actually seeking to be licensed in the cannabis industry. The Petition makes no
13 mention of *diverting* resources to combat the Board’s conduct that would have otherwise
14 been utilized in furtherance of this mission. The opposition now nonsensically claims that
15 CEIC is diverting resources from its stated mission in order to further its stated mission.
16 Opposition at 13:14-19. CEIC cannot conjure up an involuntary injury-in-fact to its
17 activities; consequently, CEIC lacks organizational standing. If courts “were to allow a
18 party whose organizational mission is to engage in policy advocacy to claim injury on the
19 basis of a need to engage in that exact activity, *any* advocacy group could find standing to
20 challenge laws when there are changes in policy.” *Women's Student Union v. United States*
21 *Dep't of Educ.*, No. 21-cv-01626-EMC, 2021 U.S. Dist. LEXIS 167220, at *15-17 (N.D. Cal.
22 Sep. 2, 2021) (citations omitted).

23 Finally, in a last-ditch effort to establish standing, CEIC argues the public-
24 importance exception recently expanded by the Nevada Supreme Court in *Nev. Pol'y Rsch.*
25 *Inst., Inc. v. Cannizzaro*, 507 P.3d 1203 (Nev. 2022). However, CEIC cannot even make a
26 facially valid argument that the exception applies. Although generally the public-
27 importance exception “requires that the plaintiff challenge a legislative expenditure or
28 appropriation as violating a specific provision of the Nevada Constitution” the Court
extended the exception to cases “where a party seeks to protect the essential nature of ‘a
government in which the three distinct departments, . . . legislative, executive, and judicial,

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 DISMISS FOR LACK
OF STANDING AND FAILURE TO
STATE A CLAIM**

This matter having come before this court on July 13, 2022, on Respondent/Defendant Nevada Board of Pharmacy's (herein after "the Board") Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim; Sadmira Ramic, 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; Brett Kandt, 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 arguments of counsel at the hearing on this matter, and with good cause appearing therefore:

1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

- 2 1. Under NRS 34.300 and NRS 34.210, a motion to dismiss is a proper response to a petition
3 for a writ of mandamus;
- 4 2. Accepting the allegations as true, both Cannabis Equity and Inclusion Community (CEIC)
5 and Antoine Poole have standing under Nevada law to seek Writ Relief;
- 6 3. Accepting the allegations as true, both Cannabis Equity and Inclusion Community
7 (CEIC) and Antoine Poole have standing under Nevada law to seek Declaratory and
8 Injunctive Relief;
- 9 4. Accepting the allegations as true, the Petition and Complaint state a claim upon which
10 relief can be granted;
- 11 5. Substantive arguments pertaining to the Motion to Dismiss for Failure to State a Claim
12 are more appropriately addressed using pleadings under Nevada Revised Statutes and
13 Nevada Rules of Civil Procedure following the submission of an Answer by the Board;
- 14 6. The Board's Motion to Dismiss pursuant to NRCP 12(b)(1) and (b)(5) is hereby DENIED
15 without prejudice in its entirety;
- 16 7. The Petitioners'/Plaintiffs' motion for a temporary injunction is hereby DENIED without
17 prejudice;
- 18 8. In conformance with the First Stipulation and Order Setting Briefing Schedule entered by
19 the Court on June 1, 2022: a) the Board shall file its Answer within 14 days of notice of
20 entry of this order; b) Petitioners/Plaintiffs shall file a Reply within 7 days of service of
21 the Answer; and c) the hearing will be scheduled within 7 days of the Reply being filed.

22 IT IS SO ORDERED this ____ day of July, 2022.

Dated this 26th day of July, 2022

23 
24 _____
HONORABLE JUDGE JOE HARDY JR.

25 **999 C29 B394 E08D**
26 **Joe Hardy**
27 **District Court Judge**

1 Respectfully submitted by:

2 **AMERICAN CIVIL LIBERTIES**
3 **UNION OF NEVADA**

4 /s/ Sadmira Ramic

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Approved as to form and content by:

NEVADA BOARD OF PHARMACY



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21 Assistant General Counsel
22 *Attorneys for Respondent/Defendant*

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**

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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: 7/26/2022

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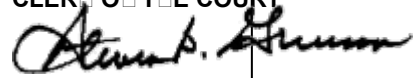
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4 CHRISTOPHER M. PETERSON, ESQ.
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15 *Attorneys for Petitioners/Plaintiffs*

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

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

16 vs.

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

20 **Respondent/Defendant.**

Case No.: A-22-851232-W

Department: 15

21 **NOTICE OF ENTRY OF ORDER**

22 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the attached **ORDER**
23 **DENYING RESPONDENT'S/DEFENDANT'S MOTION TO DISMISS FOR LACK OF**
24 **STANDING AND FAILURE TO STATE A CLAIM** in the above captioned matter was
25 entered on the 26th day of July 2022.

27 DATED this 27th day of July, 2022.
28

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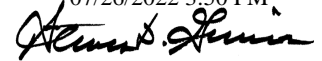
**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

/s/ Sadmira Ramic
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July 2022, I caused a true and correct copy of the foregoing **ORDER DENYING RESPONDENT’S/DEFENDANT’S MOTION TO DISMISS FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM** 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/Courtney Jones
An employee of ACLU of Nevada



CLERK OF THE COURT

ORDR

SADMIRA RAMIC, ESQ.
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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 DISMISS FOR LACK
OF STANDING AND FAILURE TO
STATE A CLAIM**

This matter having come before this court on July 13, 2022, on Respondent/Defendant Nevada Board of Pharmacy's (herein after "the Board") Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim; Sadmira Ramic, 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; Brett Kandt, 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 arguments of counsel at the hearing on this matter, and with good cause appearing therefore:

1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

- 2 1. Under NRS 34.300 and NRS 34.210, a motion to dismiss is a proper response to a petition
3 for a writ of mandamus;
- 4 2. Accepting the allegations as true, both Cannabis Equity and Inclusion Community (CEIC)
5 and Antoine Poole have standing under Nevada law to seek Writ Relief;
- 6 3. Accepting the allegations as true, both Cannabis Equity and Inclusion Community
7 (CEIC) and Antoine Poole have standing under Nevada law to seek Declaratory and
8 Injunctive Relief;
- 9 4. Accepting the allegations as true, the Petition and Complaint state a claim upon which
10 relief can be granted;
- 11 5. Substantive arguments pertaining to the Motion to Dismiss for Failure to State a Claim
12 are more appropriately addressed using pleadings under Nevada Revised Statutes and
13 Nevada Rules of Civil Procedure following the submission of an Answer by the Board;
- 14 6. The Board's Motion to Dismiss pursuant to NRCP 12(b)(1) and (b)(5) is hereby DENIED
15 without prejudice in its entirety;
- 16 7. The Petitioners'/Plaintiffs' motion for a temporary injunction is hereby DENIED without
17 prejudice;
- 18 8. In conformance with the First Stipulation and Order Setting Briefing Schedule entered by
19 the Court on June 1, 2022: a) the Board shall file its Answer within 14 days of notice of
20 entry of this order; b) Petitioners/Plaintiffs shall file a Reply within 7 days of service of
21 the Answer; and c) the hearing will be scheduled within 7 days of the Reply being filed.

22 IT IS SO ORDERED this ____ day of July, 2022.

Dated this 26th day of July, 2022

23 
24 _____
HONORABLE JUDGE JOE HARDY JR.

25 **999 C29 B394 E08D**
26 **Joe Hardy**
27 **District Court Judge**

1 Respectfully submitted by:

2 **AMERICAN CIVIL LIBERTIES**
3 **UNION OF NEVADA**

4 /s/ Sadmira Ramic

5 **SADMIRA RAMIC, ESQ.**
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Approved as to form and content by:

NEVADA BOARD OF PHARMACY



16 **BRETT KANDT, ESQ.**
17 Nevada Bar No. 5384
18 General Counsel
19 **PETER K. KEEGAN**
20 Nevada Bar No. 12237
21 Assistant General Counsel
22 *Attorneys for Respondent/Defendant*

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
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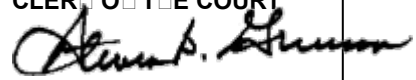
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JA - 087



1 ANSB
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9 985 Damonte Ranch Parkway – Suite 206
10 Reno, NV 89521
11 775.850.1440 – Telephone
12 *Attorneys for Respondent/Defendant*

8 **DISTRICT COURT OF**
9 **CLARK COUNTY, NEVADA**

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

Case No. A-22-851232-W

13 Petitioners/Plaintiffs,

Dept. No. 15

14 vs.

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

17 Respondent/Defendant.

18
19 **RESPONDENT/DEFENDANT’S ANSWER TO PETITIONERS/PLAINTIFFS’**
20 **PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY**
21 **AND INJUNCTIVE RELIEF**

21 Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and
22 through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant
23 General Counsel, hereby submits this Answer to Petitioners/Plaintiffs’ Petition for Writ of
24 Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This Answer
25 is based upon the following points and authorities and the papers and pleadings on file
26 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
20

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.

RPLY

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

The Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole, by and through counsel, Christopher M. Peterson, Esq., Sadmira Ramic, Esq., and Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, hereby submit this reply to the Respondent/Defendant’s Answer to Petitioners’/Plaintiffs’ Petition for Writ of Mandamus pursuant to NRS 34.260.

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MEMORANDUM OF POINTS AND AUTHORITIES

This matter raises two legal issues: (1) whether the Nevada State Board of Pharmacy’s (hereafter referred to as “Board”) designation of cannabis as a Schedule I substance, which requires the Board to find that that cannabis has “no accepted medical value in the United States” violates the Nevada Constitution in that Article 4, Section 38 explicitly guarantees that patients with certain enumerated medical diagnoses will have access to cannabis for medical treatment, and (2) whether the Board of Pharmacy is excluded from the current comprehensive regulatory regime where state agencies other than the Board oversee the cultivation, transportation, storage, dispensation, and use of cannabis in Nevada without Board involvement. Both issues are fundamentally about overreach by a state agency of the Executive branch.

The scope of a Nevadan administrative agency’s authority is limited to the matters that the Nevada State Legislature has expressly or implicitly delegated to the agency, and “an administrative agency cannot enlarge its own jurisdiction.” *City of Reno v. Civil Serv. Comm’n of Reno*, 117 Nev. 855, 858 (2001). While an administrative body may make rules and regulations calculated to carry into effect the expressed legislative intention, it may only do so within “prescribed limits and when authorized by the law-making power.” *Cashman Photo Concessions & Labs v. Nev. Gaming Comm’n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975). However, regulations that are unauthorized by the law-making power or go beyond the limits prescribed by the Legislature are invalid. *See Id.* If authority to regulate on a particular matter is not explicitly delegated to an agency, the agency must have implicit authority for the action, but “[f]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty.” *Stockmeier v. State*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011).

The Board claims that Article 4, Section 38 of the Nevada Constitution does not restrict its authority to designate cannabis a Schedule I substance, and it retained the authority to regulate cannabis despite seismic changes in cannabis’s regulatory regime with the Legislature’s passage of Nevada Revised Statute “Title 56 – Regulation of Cannabis”. These claims are inaccurate.

1 In arguing that it may designate cannabis a Schedule I substance, the Board relies solely
2 on references to federal agencies and “national” organizations. In doing so, it misinterprets the
3 term “in the United States” as used in NRS 453.166’s definition of Schedule I by suggesting that
4 the term is synonymous with the federal government rather than denoting a geographical boundary.
5 Nevada is “in the United States” and, along with the majority of other states, has accepted that
6 cannabis has medical value. Furthermore, this acceptance is enshrined in Nevada’s Constitution,
7 which is binding on state agencies such as the Board of Pharmacy.

8 As to whether the Board is authorized to regulate cannabis under the current regulatory
9 regime described in NRS Title 56, the Board offers no legal authority comparable to that granted
10 to the other state agencies involved in regulating cannabis. Furthermore, the Board errs in
11 suggesting that its participation is necessary for the regime to function as intended, as seen in the
12 very sections of the *Initiative* cited by the Board in its Answer.

13 **I. The Board errs when it claims cannabis satisfies NRS 453.166’s definition of a**
14 **“Schedule I” substance in spite of Article 4 § 38 of the Nevada Constitution due to the**
15 **Board misinterpreting the term “in the United States”.**

16 As discussed in the Petition, the Board may only designate substances as “Schedule I” if
17 the substance satisfies the definition provided in NRS 453.166. *See Miller v. Jacobson*, 104 Nev.
18 600 (1988) (finding that the Board of Pharmacy unlawfully scheduled a substance that did not
19 meet the definition of controlled substance under NRS Chapter 453). Pursuant to NRS 453.166,
such a substance must have:

- 20 (1) A high potential for abuse, and
- 21 (2) “[N]o accepted medical use in treatment in the United States” or lack
22 accepted safety for use in treatment under medical supervision.

23 The Board claims that it has the authority to designate cannabis a Schedule I substance in spite of
24 Article 4 § 38 of the Nevada Constitution because the Board has the authority to find that cannabis
25
26
27

1 has no accepted medical value “in the United States”.¹ To support this position, the Board does
2 not cite Nevada law but rather emphasizes the importance of “national” agencies and organizations
3 in making that determination, relying on reports published by the federal government’s Drug
4 Enforcement Agency and two other “national” entities as well as the current regulations
5 promulgated by federal agencies.² However, the Board’s position fails to appreciate that the term
6 “in the United States” as used in NRS 453.166 refers to the geographical boundaries of the United
7 States, not the federal government or “national” organizations.

8 Courts interpreting the term “in the United States” have consistently recognized that the
9 term refers to presence inside geographic boundaries of the United States, not the United States
10 government or “national” organizations. *See Fitisemanu v. United States*, 1 F.4th 862, 875 (10th
11 Cir. 2021) (“The Citizenship Clause's applicability hinges *on a geographic scope clause*—‘in the
12 United States’”) (emphasis added); *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1304 (11th Cir.
13 2012) (describing “in the United States” as a “strict temporal and geographic requirement”);
14 *United States v. Balde*, 943 F.3d 73, 81 (2d Cir. 2019) (“The plain meaning of the statute reflects
15 that ordinary meaning: a person, citizen or noncitizen, is ‘in’ the United States when he or she is
16 present within its geographic borders.”). This interpretation is also consistent with how the term
17 “in the United States” is used throughout the Nevada Revised Statutes. *See, e.g.* NRS 2.460
18 (referring to the physical location of libraries “in the United States”); NRS 179A.160 (referring to
19 “any jurisdiction in the United States”); NRS 200.467 (referring to the “legal right to enter or
20 remain in the United States”). By comparison, the Nevada Revised Statutes, including NRS
21 Chapter 453, refers explicitly to the “Federal Government” when referring to that entity or its
22 agencies, and to the “laws of the United States” when discussing federal law rather than the United

23
24 ¹ Respondent/Defendant’s Answer to Petitioners/Plaintiffs’ Petition for Writ of Mandamus and
25 Complaint for Declaratory and Injunctive Relief (hereafter “Answer”) at 5. The Board does not
26 claim that cannabis “lacks accepted safety for use in treatment under medical supervision” in its
27 Answer.

² Answer at 5–8.

1 States as a physical location. *See* NRS 453.154 (specifically referencing “agencies” and “the
2 Federal Government”); NRS 453.316 (referring “the laws of the United States”).

3 Due to this error in interpretation, the Board errs in focusing solely on “national”
4 organizations and federal agencies, referring to “the scientific perspective on the national level”
5 without explaining where it drew that standard or why that would be controlling over other findings
6 “in the United States”.³ As the Board notes in its Answer, 37 states *in the United States* have
7 legalized cannabis for medical use, effectively accepting its medical value.⁴ Many of these states
8 mandate that their agency equivalent of the Nevada Board of Pharmacy designate substances that
9 have a high potential for abuse and “no accepted medical value in the United States” as Schedule
10 I substances but have determined that cannabis does not meet this definition, by either not
11 designating cannabis a controlled substance or by including it on a schedule other than Schedule
12 I.⁵ Specifically states such as Arkansas, North Carolina, and Tennessee have scheduled cannabis
13 as a Schedule VI substance while Colorado and Illinois have completely removed it from their
14 controlled substance schedules.⁶ Of course, Nevada is also a state *in the United States* and has

15 ³ Answer, 5:20–21. It is also worth noting that the reports referenced by the Board do not
16 conclusively say that cannabis does not have medical value but rather that more studies need to be
17 performed before a conclusion can be drawn. National Academies of Sciences, Engineering, and
18 Medicine, *The Health Effects of Cannabis and Cannabinoids: the Current State of Evidence and*
19 *Recommendations for Research*, Washington, DC; National Academies Press, at page 1
20 (“conclusive evidence regarding the short- and long-term health effects [*harms and benefits*] of
21 cannabis use remains elusive. A lack of scientific research has resulted in a lack of information on
the health implications of cannabis use”), p. 382 (“there are specific regulatory barriers, including
the classification of cannabis as a Schedule I substance, that impede the advancement of cannabis
and cannabinoid research”), and p. 384 (“it is often difficult for researchers to gain access to the
quantity, quality, and type of cannabis product necessary to address specific research questions on
the health effects of cannabis use”).

22 ⁴ Answer, 5:22–23.

23 ⁵ *See, e.g.* Ark. Code Ann. § 5-64-203 (Arkansas); N.C. Gen. Stat. § 90-89 (North Carolina);
24 Tenn. Code Ann. § 39-17-405 (Tennessee); Colo. Rev. Stat. § 18-18-203 (Colorado); 720 Ill.
25 Comp. Stat. Ann. 570/203 (Illinois).

26 ⁶ Multiple states have re-designated cannabis to a lower schedule from Schedule I. *See* 007-07
27 Ark. Code R. § 002 (designating cannabis as a Schedule VI substance); 10A N.C. Admin. Code
26F.0107 (designating cannabis as a Schedule VI substance); Tenn. Comp. R. & Regs. 0940-06-

1 accepted that cannabis has medical value and enshrined this belief in the State constitution. Nev.
2 Const. Art. 4 § 38.

3 Finally, the Board again states that it “must consider scientific and medical evidence, not
4 popular opinion, when evaluating a substance.”⁷ This attitude, referring to two ballot initiatives
5 passed through legal referendum, provisions of the Nevada Constitution, and an entire chapter of
6 the Nevada Revised Statutes⁸ as mere “popular opinion”, is precisely why this matter is before this
7 Court. The Board may have discretion when acting within the boundaries of its authority, but it
8 has no discretion as to whether it must follow this state’s statutes and Constitution.

9 **II. The Board errs when it claims that it has retained the authority to regulate cannabis**
10 **under the current cannabis regulatory regime without an express grant of authority**
11 **similar to those offered by the Legislature to other Nevada state agencies.**

12 In its Answer, the Board observes that the regulation of cannabis in Nevada is handled by
13 multiple Nevada state agencies.⁹ The current “comprehensive, multilayered statutory scheme” to
14 regulate cannabis, as the Board describes it, is laid out in Title 56, and the Board is correct in that
15 the Legislature *explicitly* authorizes a variety of state agencies to regulate different aspects of the
16 cannabis industry, including:

- 17 • The Cannabis Compliance Board is *explicitly* authorized to “adopt regulations necessary
18 or convenient to carry out the provisions of [Title 56].”¹⁰ NRS 678A.450(1). This authority
19 includes the regulation of “medical cannabis dispensaries” as defined by NRS 678A.175
20 and the “medical use of cannabis” as defined by NRS 678A.215.
- 21 • The Cannabis Advisory Commission is *explicitly* authorized to make “recommendations
22 to the Cannabis Compliance Board regarding the regulation of, cannabis and any activity

23 _____
24 01-.06 (designating cannabis as a Schedule VI substance). Others with similar definitions of
25 Schedule I substances, including Colorado and Illinois, have not designated cannabis as a
26 controlled substance at all, regulating it directly through statute.

27 ⁷ Answer, 8:11–13.

⁸ NRS Chapter 453B, now NRS Chapter 678B.

⁹ Answer, 12:14–22.

¹⁰The breadth and scope of the NRS Title 56 is in its title: “Regulation of Cannabis”.

1 related to the cannabis” and *explicitly* placing the Directors of the Departments of Public
2 Safety and Taxation on the Commission. NRS 678A.300(1).

- 3 • The Nevada Division of Public and Behavioral Health is *explicitly* authorized to
4 promulgate regulations related to “the issuance of registry identification cards and letters
5 of approval to persons” eligible for medical cannabis under Nevada law. NRS 678B.640.
- 6 • The Nevada Department of Agriculture is *explicitly* authorized to promulgate regulations
7 regarding what pesticides may be used on cannabis or cannabis products. NRS 586.550(2);
8 *see also* NRS 678A.400 (authorizing the Cannabis Compliance Board to consult with the
9 Department of Agriculture on matters related to hemp); NRS 678B.600 (exempting
10 Department of Agriculture employees from cannabis related criminal offenses).
- 11 • The Nevada Department of Taxation is *explicitly* authorized to conduct tax audits on
12 licensees under Title 56 and to determine the fair market value of wholesale cannabis. NRS
13 678A.480; NRS 678B.640.
- 14 • Local governments are *explicitly* authorized to adopt and enforce local cannabis control
15 measures pertaining to zoning and land use for adult-use cannabis establishments. NRS
16 678D.510(1)(d).

17 Yet no similar statute authorizes the Board of Pharmacy to regulate any aspect of the cannabis
18 industry, let alone trigger a slew of criminal provisions by unilaterally keeping cannabis on its list
19 of Schedule I substances. The Board claims it “retains jurisdiction over the scheduling of cannabis
20 as a controlled substance” yet offers no citation to authorization from the Legislature to do so.¹¹
21 In fact, there is no reference to the Board of Pharmacy in all of Title 56. The Board suggests that
22 it is the Legislature’s burden to specifically deny the Board the authority to regulate cannabis,¹²
23 but this misplaces the obligation; it is on the Board to establish that the agency has authority from
24 the Legislature to regulate, not on the Legislature to deny that authority.

25 The Board’s absence from Title 56 makes sense considering that the Board of Pharmacy’s
26 primary purpose is the regulation of pharmacies and the substances that pharmacies dispense, as
27 the agency’s name denotes. The Board’s general powers are not even described in NRS Chapter
453 but rather in NRS Chapter 639, which is titled “Pharmacists and Pharmacies”. *See* NRS

¹¹ Answer, 12:22–24 (offering no legal citation in support of claim).

¹² Answer, 13:7–9.

1 639.070.¹³ Cannabis, both medical and recreational, has nothing to do with pharmacies since,
2 under the current regulatory regime, both types of cannabis are dispensed under Nevada law by
3 dispensaries, not pharmacies. NRS 678A.450(1) (authorizing the Cannabis Compliance Board to
4 regulate the dispensation of both medical and recreational cannabis). Under the statutory scheme,
5 the Board could not authorize a pharmacy to distribute cannabis as any distributor of cannabis
6 must be licensed by the Cannabis Control Board. *Id.*; *see also* Cannabis Compliance Board,
7 *Medical Cannabis*, <https://ccb.nv.gov/nevada-cannabis-program/#item-0> (August 17, 2022) (“As
8 of July 1, 2020, the medical cannabis program is administered by the Cannabis Compliance
9 Board”). Considering that every aspect of the cannabis industry, including dispensation, is
10 regulated by state agencies whose roles are explicitly described by statute, the Board of Pharmacy
11 is not included in cannabis’s regulatory regime because the Board is not necessary. Moreover, the
12 Board has specifically and explicitly advised the public that it “has no jurisdiction over the medical
13 use of marijuana.”¹⁴

14 Recycling an argument from its Motion to Dismiss,¹⁵ the Board further claims that
15 excluding the Board from cannabis’s regulatory regime would “render Sections 4 and 6-8 of the
16 [*Initiative to Regulate and Tax Marijuana*] meaningless and impermissibly thwart the will of the
17
18

19 ¹³ Interestingly, the only reference to cannabis in the entirety of NRS Chapter 639 suggests that
20 cannabis, like alcohol, is *not* a controlled substance. In a provision discussing what must be in a
21 prescription medication agreement, the agreement must include “a requirement that the patient
22 inform the practitioner: (1) [o]f any other controlled substances prescribed to or taken by the
23 patient; (2) [w]hether the patient drinks alcohol or uses cannabis or any other cannabinoid
24 compound while using the controlled substance.” NRS 639.23914(2)(e)(1–2). The inclusion of
25 cannabis under the second subsection would be redundant if it is a controlled substance under the
26 first subsection.

27 ¹⁴ Nevada State Board of Pharmacy, *Practice Frequently Asked Questions*,
https://bop.nv.gov/resources/FAQ/Practice_FAQ/ (August 17, 2022).

¹⁵ Respondent/Defendant’s Motion to Dismiss for Lack of Jurisdiction and Failure to State a
Claim (hereafter “Motion”) at 7:20–7:23.

1 electorate.”¹⁶ As Petitioners observed in their Opposition to the Motion to Dismiss,¹⁷ these sections
2 actually favor a finding that the Board is no longer part of that regime. For example, while Section
3 4 “does not prevent the imposition of any civil, criminal, or other penalty for” certain enumerated
4 acts (e.g. driving under the influence of cannabis, possessing cannabis in prisons, etc.), the
5 *Initiative* does not require cannabis to be a “controlled substance” by the Board for the Legislature
6 to make those enumerated actions illegal.¹⁸

7 At its core, the Board’s logic is that since some acts involving cannabis are still illegal, the
8 Board has retained the right to regulate cannabis.¹⁹ Provisions such as NRS 212.160, and others
9 cited by the Board in its own Answer,²⁰ expose that fallacy: the State Legislature is perfectly
10 capable of determining what acts involving cannabis are criminal without the Board’s
11 involvement, just as it does with alcohol.

12
13
14 ¹⁶ Answer at 11:17–18.

15 ¹⁷ Petitioners’/Plaintiffs’ Opposition to Respondent’s/Defendant’s Motion to Dismiss for Lack of
16 Jurisdiction and Failure to State a Claim (hereafter “Opposition”) at 23–24.

17 ¹⁸ To provide a more specific example, the act described in Section 4, Subsection 1(c) is illegal
18 under NRS 212.160, which states:

19 A prisoner confined in an institution of the Department of Corrections, or any other
20 place where prisoners are authorized to be or are assigned by the Director of the
21 Department, who possesses a *controlled substance without lawful authorization or
22 marijuana or marijuana paraphernalia*, regardless of whether the person holds a
valid registry identification card to engage in the medical use of cannabis pursuant
to chapter 678C of NRS, is guilty of a category D felony and shall be punished as
provided in NRS 193.130.

23 NRS 212.160(3) (emphasis added). Relying on the same canon of statutory interpretation as the
24 Respondent used in its Motion to Dismiss, plain language of NRS 212.160 indicates that the
25 Legislature does not intend for cannabis to be a “controlled substance” under the Board’s control,
otherwise the language “or marijuana or marijuana paraphernalia” would be superfluous.

26 ¹⁹ Answer at 9:24, 10:1–2.

27 ²⁰ Answer at 16:5–18.

1 **III. To the extent that Board seeks to re-litigate issues it raised in its Motion to Dismiss**
2 **related to standing and exhaustion, Petitioner incorporates points and authorities**
3 **raised in their Opposition to the Motion to Dismiss.**

4 The Board seeks to re-litigate issues raised in its Motion to Dismiss, which are addressed
5 in Petitioners' Opposition, specifically that (1) Petitioners lack standing to bring a petition for writ
6 of mandamus, (2) the Nevada Legislature has not explicitly removed cannabis from the list of
7 Schedule I controlled substance, and (3) Petitioners are barred from petitioning for a writ of
8 mandamus as they have an adequate and speedy remedy at law, specifically that the Petitioners
9 were required to petition the Board prior to petitioning for writ of mandamus. Though the Court
10 has already ruled on the Board's Motion to Dismiss, to the extent necessary, Petitioners incorporate
11 the relevant responses from their Opposition into this reply.²¹

12 DATED this 17th day of August 2022.

13 Pursuant to NRS 53.045, I declare under
14 penalty of perjury that the foregoing is
15 true and correct.

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

18 /s/ Christopher Peterson
19 CHRISTOPHER M. PETERSON, ESQ.
20 Nevada Bar No. 13932
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Attorneys for Petitioners/Plaintiffs

21 Opposition at 9–17(response to arguments related to standing), 17–19 (response to arguments
that Petitioners have an adequate and speedy remedy such as petitioning the Board), 25 (response
to arguments that the Legislature has not explicitly removed cannabis from the list of Schedule I
controlled substances).

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August 2022, I caused a true and correct copy of the foregoing **PETITIONERS'/PLAINTIFFS' REPLY TO RESPONDENT'S/DEFENDANT'S ANSWER TO PETITIONERS'/PLAINTIFFS' PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY RELIEF** 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/Courtney Jones
An employee of ACLU of Nevada

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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.

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.

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

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.

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**

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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

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