

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 III OF III

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ALPHABETICAL INDEX TO JOINT APPENDIX

DOCUMENT DESCRIPTION	Filed Date	VOLUME	PAGE NOS.
Case Appeal Statement from the Judgment and Order Granting Petition for Writ of Mandamus	11/23/2022	II	229-232
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
Memorandum of Costs and Disbursements	11/16/2022	II	225
Notice of Appeal from the Judgment and Order Granting Petition for Writ of Mandamus	11/23/2022	II	226-228
Notice of Appeal of Order Granting Attorney Fees and Costs	02/15/2023	III	354-356
Notice of Entry of Order	07/27/2022	I	082-087
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Order Denying Respondent's/Defendant's Motion to Dismiss for Lack of Standing and Failure to State a Claim	07/26/2022	I	078-081
Order Denying Respondent's/Defendant's Motion to Stay Judgment and Order Pending Appeal, February 8, 2023	02/08/2023	III	338-345
Order Granting Petitioners' Motion for Attorney Fees and Costs	02/08/2023	III	346-353
Petitioner's Motion for Attorney Fees and Costs	11/16/2022	II	194-224
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

DOCUMENT DESCRIPTION	Filed Date	VOLUME	PAGE NOS.
as Schedule I Substances and Complaint for Declaratory and Injunctive Relief, April 15, 2022			
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
Petitioners'/Plaintiffs' Opposition to Respondent's/Defendant's Motion to Stay Judgement and Order Pending Appeal	12/07/2022	III	247-256
Petitioners'/Plaintiffs' Reply to Respondent's/Defendant's Answer to Petitioner's/Plaintiff's Petitioner for Writ of Mandamus and Complaint for Declaratory Relief	08/17/2022	I	106-116
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Recorder's Transcript of Hearing RE: Respondent/Defendant's Motion to Stay Judgement and Order Pending Appeal; Motion for Attorney Fees and Costs Before the Honorable Judge Joe Hardy, District Court Judge, Wednesday, January 9, 2023	01/31/2023	III	305-337

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
Respondent/Defendant's Motion to Stay Judgment and Order Pending Appeal	11/23/2022	III	239-246
Respondent/Defendant's Opposition to Petitioners' Motion for Attorney Fees and Costs	11/23/2022	II	233-238
Respondent/Defendant's Reply Memorandum of Points and Authorities on Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim	07/05/2022	I	068-077
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

DOCUMENT DESCRIPTION	Filed Date	VOLUME	PAGE Nos.
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.

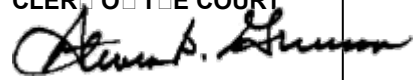
By: /s/ Gregory L. Zunino
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CERTIFICATE OF SERVICE

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
Pharmacy



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12 *Attorneys for Respondent/Defendant*

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

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

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

HEARING REQUESTED

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

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

1 **NOTICE OF MOTION**

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

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

2 **I. PROCEDURAL HISTORY**

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

11 **II. LEGAL STANDARD**

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

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

1 **III. ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

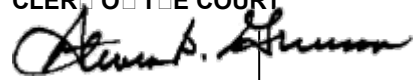
26 ³ In 1981 the Nevada Legislature empowered the Board of Pharmacy to designate,
27 by regulation, the substances to be contained in each schedule. See 1981 Nev. Stats. ch.
28 402 §§ 1-39 at 734-750; see also *Miller v. Jacobson*, 104 Nev. 600, 602, 763 P.2d 356, 357
(1988); *Sheriff, Clark Cty. v.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

1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of the Nevada State Board of Pharmacy, and that on
3 this 23rd day of November 2022, I served a true and correct copy of the foregoing document
4 by electronic service though the Court's electronic filing system to the following:

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7 Sophia Romero, Esq.
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13 /s/ Brett Kandt
14 BRETT KANDT
15 General Counsel
16 Nevada State Board of Pharmacy
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W

Department: 15

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

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

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

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

26 _____
27 ¹ Resp’t Mot. p. 4,5,7.

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

3 **I. LEGAL STANDARD**

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

11 **II. ARGUMENT**

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

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

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

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

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

27 ⁴Resp't Mot. p. 4.

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

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

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

23
24 _____
25 ⁵ Resp’t Mot. p. 4.

26 ⁶ See NRAP 8(c)(2).

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

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

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

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

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23 ⁸ Resp’t Mot. p. 5.

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

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

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

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

18 As it relates to Mr. Poole and CEIC members who have been convicted under statutes
19 stemming from the Board's unconstitutional regulation of cannabis, they too would suffer
20 irreparable harm. While the Court's order does not directly address Mr. Poole's unconstitutional
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24 ¹⁰ See NRAP 8(c)(3).

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

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

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

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

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

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

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

27 ¹³ Resp’t Mot. p. 7.

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

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

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

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

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

4 **V. CONCLUSION**

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

8
9 DATED this 7th day of December 2022.

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

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

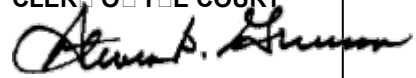
17 /s/ Sadmira Ramic
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CERTIFICATE OF SERVICE

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

/s/Christopher Peterson
Employee for the ACLU of Nevada



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13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

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

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

Hearing Date: January 9, 2023

Hearing Time: 9:00 AM

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

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

1 **I. PROCEDURAL HISTORY**

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

4 **II. ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ⁴ Opp. at p. 6-7.

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

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

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

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

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

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

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

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

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

1 **III. CONCLUSION**

2 Based upon the foregoing, the State respectfully requests that the Judgment and
3 Order be stayed pending resolution of the Board’s appeal to the Nevada Supreme Court.

4 Respectfully submitted this 30th of December 2022.

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

7
8 By: /s/ Brett Kandt
9 Brett Kandt (Bar No. 5384)
10 General Counsel
11 Peter K. Keegan (Bar. No. 12237)
12 Assistant General Counsel
13 *Attorneys for Respondent/Defendant*
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EXHIBIT 1

1 **DECL**

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12 *Attorneys for Respondent/Defendant*

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

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

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

Hearing Date: January 9, 2023

Hearing Time: 9:00 AM

25 **DECLARATION OF CAPTAIN JOSHUA BITSKO**
26 **IN SUPPORT OF MOTION TO STAY JUDGMENT AND ORDER PENDING**
27 **APPEAL**
28

DECLARATION OF CAPTAIN JOSHUA BITSKO

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I, Joshua Bitsko, hereby declare under the penalty of perjury:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and, as to those, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. That I am employed by the Las Vegas Metropolitan Police Department (LVMPD) as a Captain. For the last year I was in the Tourist Safety Division assigned to the Convention Center Area Command (CCAC).

3. I have been in law enforcement for twenty-two years with the LVMPD and have worked various assignments throughout the department to include patrol and detective sergeant. My most recent assignment was as the Captain of the CCAC.

4. The CCAC is responsible for crime prevention and criminal apprehension for the Las Vegas resort corridor as well as Allegiant Stadium and its surrounding area.

5. The CCAC is a dense area consisting of world class casino resorts, entertainment, and large sports arena venues which are visited by millions of tourists each year.

6. I am aware of a district court ruling which prevents the Nevada State Board of Pharmacy from assigning a controlled substance schedule to marijuana.

7. Based upon my experience as CCAC Captain, I am aware that incidents of unlawful possession with the intent to sell, transport, and sales of marijuana frequently occur within the Las Vegas resort corridor. It is not uncommon for those who engage in these activities to be armed with firearms or other weapons. Prior to the Court’s ruling, unlawful possession with the intent to sell, transport, and sales of marijuana were felony offenses. Arresting suspects who engage in these activities allows law enforcement to remove those who engage in the unlawful possession with the intent to sell, transport, and sales of marijuana from the Las Vegas resort corridor. Moreover, during these arrests, members of law enforcement discover and secure firearms or weapons the arrestees may have in their possession, thereby making the Las Vegas


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

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

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

EXECUTED this 28th day of December 2022.

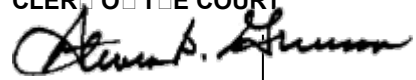
Signature 
Joshua Bitsko

1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of the Nevada State Board of Pharmacy, and that on
3 this 30th of December 2022, I served a true and correct copy of the foregoing document by
4 electronic service through the Court's electronic filing system to the following:

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13 /s/ Brett Kandt
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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
OPPOSITION TO PETITIONERS' MOTION FOR ATTORNEY FEES AND COSTS**

The Petitioners/Plaintiffs (hereafter "Plaintiffs"), Cannabis Equity and Inclusion
Community ("CEIC") and Antoine Poole, by and through counsel Sadmira Ramic, Esq.,
Christopher M. Peterson, Esq., and Sophia A. Romero, Esq., of the American Civil Liberties Union
of Nevada, hereby submit this reply to the Respondent/Defendant's Opposition to Petitioners'
Motion for Attorney Fees and Costs.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs’ original motion for attorney fees costs made its request pursuant to NRS 34.270
3 or, in the alternative, as special damages. Plaintiffs address the relevant arguments from the
4 Board’s Opposition.

5 **I. Pursuant to NRS 34.270, Plaintiffs are entitled to attorney fees as a cost of litigation.**

6 As previously stated, a party may recover attorney fees if “authorized by statute, rule, or
7 agreement” as a cost of litigation. *Pardee Homes v. Wolfram*, 135 Nev. Adv. Rep. 22, 444 P.3d
8 423, 426 (2019). The Board suggests without legal authority that an authorizing statute must
9 specifically use the term “attorney fees” to grant such authorization. Resp’t/Def.’s Opp. to Pet’rs’
10 Mot. for Att’y Fees and Costs, at 4:3-10. The Board’s proposed limitation is unsupported by any
11 relevant legal authority.

12 Nevada has recognized on multiple occasions that provisions of statutes, rules, and
13 agreements include attorney fees as a cost of litigation even when the provision does not use the
14 language “attorney fees.” Neither NRCP 65(c)¹ nor NRS 17.130(1)² use the term “attorney fees”
15 yet both recognize attorney fees as a cost of litigation. *Sandy Valley Assocs. v. Sky Ranch Estates*
16 *Owners Ass’n*, 117 Nev. 948, 968–69 n.6 (2001) (“The following cases involved the award of
17 attorney fees as a cost of litigation pursuant to a rule, statute or agreement” and “[a]ny language
18 suggesting the fees were awarded as damages is hereby disapproved.”) (citing *Artistic*
19 *Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971) (granting attorney fees pursuant to
20 NRCP 65(c)); *Waddle v. L.V.R.V.*, 122 Nev. 15, 26 – 27 (2006) (determining that term “any debt,

21 _____
22 ¹ “Security. The court may issue a preliminary injunction or a temporary restraining order only if
23 the movant gives security in an amount that the court considers proper to pay the costs and damages
24 sustained by any party found to have been wrongfully enjoined or restrained. The State, its officers,
and its agencies are not required to give security.” NRCP 65(c).

25 ² “In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs,
26 and in all executions issued thereon, the amount must be computed, as near as may be, in dollars
27 and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be considered
erroneous for that omission.” NRS 17.130(1).

1 damages or costs” as used in NRS 17.130(1) included attorney fees in the context of the award of
2 post-judgment interest awards even though the term “attorney fees” did not appear in that statute).
3 Nevada has granted attorney fees as cost of litigation based upon contractual provisions that only
4 guaranteed reimbursement for “damage to and loss of equipment for any cause” and “loss, damage,
5 liability, cost of expense, of whatsoever nature or cause, arising out of [defendant]’s use or
6 possession of equipment.” See *James Hardie Gypsum, Inc. v. Inquipco*, 112 Nev. 1397, 1405–07
7 (1996) (cited by *Sandy Valley Assocs.*, 117 Nev. at 968–69 n.6). By comparison, the Board fails
8 to offer any instances where a Nevada statutory provisions explicitly authorizing the recovery of
9 damages and costs to a party did not authorize the recovery of attorney fees.

10 Turning to the provision relevant to this matter, NRS 34.270 states that “[i]f judgment be
11 given for the applicant,” applicant may “recover the damages which applicant shall have sustained
12 as found by a jury, or as may be determined by the court or master, upon a reference to be ordered,
13 together with costs; and for such damages and costs an execution may issue, a peremptory mandate
14 shall also be awarded without delay.” There is no meaningful difference between this language
15 and that language justifying the recovery of attorney fees pursuant to NRCP 65(c) in *Artistic*
16 *Hairdresser, Inc.*, 87 Nev. at 315–16. There is also no meaningful difference between NRS
17 34.270’s authorization to seek damages and costs and the contractual provision at issue in *James*
18 *Hardie Gypsum, Inc.*, 112 Nev. at 1405–07, or the language in NRS 17.130(1) that the Nevada
19 Supreme Court’s relied upon to find that attorney fees were subject to post-judgment interest
20 awards in *Waddle*. 122 Nev. at 26 – 27.

21 Despite the Board’s flat refusal to acknowledge the legal precedent, Respt/Def.’s Opp. to
22 Pet’rs’ Mot for Att’y Fees and Costs, at 4:8-10, attorney fees have been granted pursuant to NRS
23 34.270 to qualifying applicants without reversal by the Nevada Supreme Court. See *Guldranson*
24 *v. Sparks*, 89 Nev. 93, 94–95 (1973) (reversing denial of damages but leaving untouched grant of
25 \$500.00 in attorney fees pursuant to NRS 34.270). Finally, other state courts reviewing statutes
26 effectively identical to NRS 34.270 have found that such provisions include the recovery of
27 attorney’s fees. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979) (holding

1 that Mont. Code. Ann. § 27-26-402³ allowed for the recovery of attorney fees); *Colorado Dev. Co.*
2 *v. Creer*, 96 Utah 1, 17–18 (1938) (determining that Utah Code Ann. § 78B-6-609⁴ included the
3 recovery of attorney fees if supported by sufficient evidence).

4 In sum, NRS 34.270 authorizes the Plaintiffs in this matter to recover attorney fees.

5 **II. Even if NRS 34.270 did not exist to authorize the recovery of attorney fees in this**
6 **matter, Plaintiffs would be entitled to recover their attorney fees as damages.**

7 Even if a statutory provision like NRS 34.270 did not exist to authorize the recovery of
8 attorney fees, a plaintiff may seek attorney fees as special damages if “as with any other item of
9 damages . . . pleaded and proven with competent evidence.” *Pardee Homes*, 444 P.3d at 426. The
10 pleading must comply with NRCP 9(g), which states that “if an item of special damage is claimed,
11 it must be specifically stated.” As for what evidence is required to establish a claim for attorney
12 fees, the Nevada Supreme Court has “narrowly construed a party’s ability to recover attorney fees
13 as special damages to instances where attorney fees were incurred because, as a result of the
14 defendant’s intentional efforts, the plaintiff had no choice but to litigate.” *Mitchell v. Nype*, No.
15 80693, 2022 Nev. Unpub. LEXIS 694 *7 (Sept. 23, 2022) (unpublished). While these restrictions
16 may bar other parties from recovering attorney fees in other matters, Plaintiffs satisfy both
17 requirements in this matter.

18 First, the Board claims that the attorney fees are not recoverable as special damages in this
19 matter because the fees were not plead as special damages in the complaint. Resp’t/Def.’s Opp. to

20 ³ “If judgment is given for the applicant: (1) the applicant may recover the damages that the
21 applicant has sustained, as found by the jury or as determined by the court or referees, if a reference
22 was ordered, together with costs; (2) an execution may issue for the damages and costs; and (3) a
peremptory mandate must be awarded without delay.” Mont. Code Ann. § 27-26-402.

23 ⁴ “In any proceeding to obtain a writ of mandate or prohibition, if judgment is given for the
24 applicant, he may recover the damages which were sustained, as found by the jury, or determined
25 by the court, or referees upon a reference, ordered together with costs. For damages and costs an
26 execution may issue, and a peremptory mandate shall be awarded without delay.” Utah Code Ann.
27 § 78B-6-609.

1 Pet'rs' Mot. for Att'y Fees and Costs, at 4:3-10. However, it is undisputed that Plaintiffs
2 specifically requested attorney fees as a form of relief in this matter, and the Board fails to explain
3 how the pleading language was insufficient to place the Board on notice that Plaintiffs intended to
4 seek attorney fees.

5 Second, the Board errs in returning, yet again, to the position that Plaintiffs should have
6 petitioned the Board first to have cannabis removed from the list of Schedule I substances.
7 Resp't/Def.'s Opp. to Mtn. for Att'y Fees and Costs at 5:10–13. This position would be credible
8 if the Board had removed cannabis from its list of scheduled substances when this suit was filed
9 in April 15, 2022, or even if the Board accepted this Court's ruling without appeal, but the Board's
10 continued resistance is strong evidence that petitioning the Board would have been futile, leaving
11 litigation the only option.

12 The Board's other actions in this matter further establish that Plaintiffs had no other option
13 besides litigation to vindicate their rights. At the very first hearing before this Court, the Board
14 argued that Plaintiffs were required to serve the Attorney General's Office and that proceedings
15 would should be delayed, or dismissed, until that service was complete. The Board failed to inform
16 this Court at that time that such service would have no substantive impact on the matter: the Board
17 has its own counsel and was never represented by the Attorney General. Turning to the Board's
18 Motion to Dismiss, which required that all parties to appear in court for argument, the Board raised
19 no arguments in that filing that could not have been raised in an Answer to the Plaintiff's initial
20 petition; in fact, the Board raised *all* arguments raised in its Motion to Dismiss *a second time* when
21 it ultimately filed its Answer to the Petition. *Compare* Resp't/Def.'s Mot. to Dismiss for Lack of
22 Jurisdiction and Failure to State a Claim at 4–7 (arguing that Plaintiff's lack standing), 7–9
23 (arguing that “[n]othing in express language of either ballot initiative compels the deletion of
24 marijuana from NAC 453.510”), 10 (arguing that “[t]he Nevada Legislature has not taken any
25 action to deschedule marijuana”), and 11 (arguing that “Plaintiffs may petition the Board pursuant
26 to NAC 639.140 to review the scheduling of marijuana”) *to* Resp't/Def.'s Answer to Pet'rs/Pls.'
27 Pet. for Writ of Mandamus and Compl. for Declaratory and Injunctive Relief at 14–15 (again
arguing that Plaintiff's lack standing), 8–10 (again arguing that “[n]othing in express language of

1 either ballot initiative compels the deletion of marijuana from NAC 453.510”), 10–11 (again
2 arguing that that “[t]he Nevada Legislature has not taken any action to deschedule marijuana”), 13
3 – 14 (again arguing that “Plaintiffs may petition the Board pursuant to NAC 639.140 to review the
4 scheduling of marijuana”). The Board’s litigation strategy has prolonged this matter for over six
5 months, stretching what could have been resolved in a single hearing into three, a single petition
6 and answer into multiple filings. While the Board has the right to litigate its cases as it sees fit, it
7 cannot take such an approach and then suggest that Plaintiffs had other options besides litigation
8 to resolve the Board’s continued and intentional unconstitutional conduct.

9 The Board’s unconstitutional actions and its continuing efforts to delay the inevitable end
10 of those actions incurred costs of time and resources to the Plaintiffs. Even if NRS 34.270 did not
11 authorize recovery of attorney fees, Plaintiffs are entitled to recover their counsel fees as special
12 damages.

13 DATED this 31st day of December 2022.

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

19 **AMERICAN CIVIL LIBERTIES
20 UNION OF NEVADA**

21 /s/ Christopher Peterson
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December 2022, I caused a true and correct copy of the foregoing **PETITIONERS’/PLAINTIFFS’ REPLY TO RESPONDENT/DEFENDANT’S OPPOSITION TO PETITIONERS’ MOTION FOR ATTORNEY FEES AND COSTS** to be electronically filed and served to all parties of record via the Court’s electronic filing system to all parties listed on the e-service master list.

/s/Christopher Peterson
An employee of ACLU of Nevada

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DISTRICT COURT
CLARK COUNTY, NEVADA

CANNABIS EQUITY AND)	CASE NO.: A-22-851232-W
INCLUSION COMMUNITY)	
(CEIC),)	DEPT. XV
)	
Plaintiff,)	
)	
vs.)	
)	
STATE OF NEVADA ex rel.)	
BOARD OF PHARMACY,)	
)	
Defendant.)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE
WEDNESDAY, JULY 13, 2022

***RECORDER'S TRANSCRIPT OF HEARING RE:
RESPONDENT/DEFENDANT'S MOTION TO DISMISS FOR LACK OF
JURISDICTION AND FAILURE TO STATE A CLAIM***

APPEARANCES:

For the Plaintiff:	SADMIRA RAMIC, ESQ. SOPHIA A. ROMERO, ESQ.
For the Defendant:	WILLIAM B. KANDT, ESQ.

RECORDED BY: MATTHEW YARBROUGH, COURT RECORDER

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Las Vegas, Nevada; Wednesday, July 13, 2022

[Proceeding commenced at 9:29 a.m.]

THE CLERK: -- Inclusion Community vs. Nevada ex rel. Board of Pharmacy. Case number A-22-891232.

MS. RAMIC: Good morning, Your Honor.

THE COURT: Yeah. Let's wait, I guess. There's some folks walking in.

[Pause in proceedings]

THE COURT: Okay. As the marshal has instructed all of you who just came in, put your cell phones in your pockets or your purses. Do not use them while you're in the courtroom. That's much appreciated.

Go ahead and state your appearances.

MS. RAMIC: Thank you, Your Honor. Sadmira Ramic, bar number 15984, and with me is Sophia Romero, bar number 12446, and we are here on behalf of the petitioners.

THE COURT: Good morning.

MS. RAMIC: Good morning.

MR. KANDT: Good morning, Your Honor. Brett Kandt on behalf of the State of Nevada Board of Pharmacy, bar number 5384.

THE COURT: Thank you. Good morning.

So I have reviewed Respondent/Defendants Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim as well as Petitioners/Plaintiffs opposition to that and respond --

1 Defendant's reply.

2 Welcome arguments beginning with Mr. Kandt.

3 MR. KANDT: Okay. Well, Your Honor, first of all, I think
4 it's important to note that the plaintiffs don't allege that they've
5 been denied the opportunity to use marijuana upon the advise of a
6 physician in conformance with Article 4, Section 38 of the
7 Constitution. Nor do they allege that they've been denied the
8 opportunity to use marijuana recreationally in conformance with
9 Title 56 of NRS.

10 Rather, they are seeking to have marijuana descheduled
11 altogether and seeking to have criminal convictions related to
12 marijuana specific offenses overturned.

13 But they're equating the right of a Nevada patient to use
14 marijuana upon the advice of a physician with marijuana having an
15 accepted medical use and treatment in the United States. But one
16 doesn't equal the other.

17 The standard for determining whether a drug has
18 accepted medical use and treatment in the United States is how it's
19 treated on the federal level. And on the federal level, marijuana
20 remains a Schedule 1 controlled substance. And on the national
21 level, all states recognize that federal designation. Even as some 37
22 states, District of Columbia, some territories, have allowed for
23 limited use of medical marijuana.

24 So there's no conflict between the Constitution and the
25 scheduling of marijuana in Schedule 1. Certainly, one or both of

1 the ballot initiatives could have squarely addressed that issue.
2 Neither did. To the contrary, both of those initiatives delineated
3 between lawful and unlawful use, and also recognized that there
4 were certain acts that go within the scope of lawful use that would
5 then be exempt from state prosecution. And that's important
6 because an exemption from state prosecution means you engaged
7 in an act that would otherwise constitute a criminal offense, but you
8 will not face prosecution for it.

9 I think it's important to note that in the 22 years since the
10 Nevada Medical Marijuana initiative was passed by the voters, the
11 Nevada Legislature has never deemed it necessary to deschedule
12 or reschedule marijuana to fulfill that constitutional mandate. In
13 that time they have passed, at least, nine pieces of legislation to
14 implement the voters will. They've never deemed it necessary.

15 I think it's also important to note that in that 22 years,
16 nobody's ever petitioned the Board of Pharmacy to review the
17 scheduling of marijuana in light of passage of the ballot initiatives.
18 And that's the statutory process. The petitioners are seeking to
19 circumvent and coming straight to this Court rather than utilize that
20 administrative process. And it's important that that administrative
21 process be utilized because the board has this responsibility to
22 make some specific factual determinations when scheduling, or
23 rescheduling, or descheduling a drug.

24 Then when we look at the 2016 ballot initiative, the
25 Nevada marijuana legislature legalization initiative, it didn't divest the

1 Board of its authority to schedule marijuana. Certainly the initiative
2 placed regulatory oversight the lawful use of marijuana, initially
3 with the Department of Taxation, and now with the Cannabis
4 Compliance Board.

5 So to the extent there was some precatory language in
6 the initiative that talked about regulating marijuana in a manner
7 similar to alcohol, that's taking place on the lawful side under the
8 existing statutory scheme in Title 56 of NRS. But that, by no
9 means, either explicitly or implicitly, divested the Board of its
10 jurisdiction to schedule controlled substances including marijuana.

11 And once again, in the course of implementing that
12 statutory scheme, the Legislature has never deemed it necessary to
13 deschedule or reschedule marijuana or to divest the Board of its
14 authority under NRS Chapter 453 to schedule marijuana.

15 And I think it's clear that the goal of the petitioners is to
16 have marijuana descheduled altogether. And certainly that doesn't
17 take into account that a substance can be scheduled from 2 through
18 5, even if it has some accepted medical use for treatment in the
19 United States based upon its potential for abuse and any resulting
20 physical or psychological dependents.

21 THE COURT: Okay. So let me ask on that point. I know
22 you raised it, at least, in the reply, if not the motion, but where do
23 you get that? You know, their petitioners, I guess you would call it,
24 maybe desire to deschedule altogether. What's that based on?

25 MR. KANDT: I'm sorry, Your Honor. Could you repeat

1 your question.

2 THE COURT: Oh, sorry.

3 MR. KANDT: I have some poor hearing.

4 THE COURT: And I'm not super loud, so I'll lean forward
5 into the microphone.

6 So you made a statement, and it's also contained in your
7 briefs, that something to the effect of petitioners want marijuana
8 descheduled altogether. And so, my question is, where do you get
9 that from? Is there -- do they come out and say that? Are you
10 reading between the lines? Where do you get that argument from?

11 MR. KANDT: Thank you, Your Honor. So that's the result
12 because if there's a judicial determination that Schedule 1 is
13 unconstitutional, and a further judicial determination that the Board
14 of Pharmacy has no authority to schedule marijuana then it's to
15 simply deschedule it altogether. So it would be the natural
16 outcome of those two determinations.

17 THE COURT: Okay. And I interrupted you, so go ahead.
18 You can continue with your argument.

19 MR. KANDT: Okay. Thank you.

20 Well, with regard to the issue of standing, I don't think the
21 injuries are redressable and that's because -- and once again, part
22 of the difficulty here, they have one specific plaintiff that was
23 convicted under a specific statute but then they have this
24 organization that makes these broad generalized claims that they
25 have members who have been convicted of marijuana offenses.

1 But when you look through the relevant laws, you have at least
2 three that don't make any reference to marijuana as a controlled
3 substance, they just say marijuana. And so, if you look at those
4 three and those, of course, are NRS 453.339 with regard to
5 trafficking, 453.3393, production, and finally, 453.3364 which is
6 possession of small amounts, they don't talk about a controlled
7 substance. They specifically reference marijuana.

8 Certainly the statute that Plaintiff Poole alleges he was
9 convicted under, which is subsection 4 of 453.336, it talks about
10 unlawful possession of any controlled substance. So certainly, if
11 marijuana was rescheduled, somebody could still face prosecution
12 under that statute. It -- once again, it would depend upon
13 marijuana being descheduled altogether for somebody to obtain
14 relief with regard to that.

15 Another statute that the petitioners reference is NRS
16 202.360 regarding unlawful possession of a firearm by a person
17 who unlawfully uses any controlled substance. But once again, it
18 talks about unlawful use. If you are lawfully using marijuana in
19 conformance with NRS Chapter 678C or 678D, that's not unlawful
20 use, and you wouldn't face that prohibition.

21 And then when we look at 453.337, the unlawful
22 possession for the purpose of sale of a Schedule 1 or 2, that was
23 clearly prescribed under both ballot initiatives anyhow. And that to
24 me, is really important that the ballot initiatives themselves
25 delineated between the lawful use that was being authorized by the

1 initiative and the fact that any other use outside of what was being
2 authorized under the ballot initiative would remain unlawful. And
3 the Legislature has also reflected that through their actions.

4 And so, when we look at the CEIC members, those with
5 prior criminal convictions for offenses that are specific to
6 marijuana, they will not gain relief because those were offenses
7 that specifically reference marijuana. So I think by virtue of that,
8 CEIC can't gain associational standing for those members.

9 And when we look at the redressability issue for the
10 members seeking to be licensed in the cannabis industry, that's
11 even more impermissibly generalized and marginally related
12 because we don't know what they were convicted of. We don't
13 know, you know, this is the people that are being assisted by the
14 organization with regard to addressing their past convictions and
15 possibly having them sealed or what not. It doesn't say that those
16 people are also trying to get licensed in the cannabis industry.

17 And so, once again, I think both on the associational
18 standing basis and the organizational standing basis, they haven't
19 sufficiently pled to have standing because they don't talk about
20 diverting resources to combat the Board's conduct that otherwise
21 would have been utilized in further of the mission, the mission that
22 they stated and pled in their petition.

23 THE COURT: How do you --

24 MR. KANDT: And I certainly would argue that the public
25 importance exception doesn't apply because the petition doesn't

1 implicate the separation of powers under the constitution.

2 THE COURT: Along the standing argument, how do you
3 address the relatively recent case of *NPRI vs. Cannizzaro* in terms of
4 -- doesn't that case, I mean, if not create, certainly confirm a
5 broader standing to organizations. So how would that, you know,
6 how do you distinguish that case?

7 MR. KANDT: I'm sorry. What's the question, again, Your
8 Honor?

9 THE COURT: So the *NPRI* case --

10 MR. KANDT: Yes.

11 THE COURT: -- you know, seemed, to me at least, either,
12 you know, whether you call it confirm or whether you call it create,
13 a broader type of view of standing in terms of organizations, how
14 do you distinguish that *NPRI* case where the Nevada Supreme
15 Court did find standing versus this case?

16 MR. KANDT: Okay. Thanks, Your Honor.

17 I think it's easily distinguishable because, once again,
18 originally, the Court had articulated that the public importance
19 exception requires that the plaintiff challenge a legislative
20 expenditure or appropriation as violating a specific provision of the
21 Nevada Constitution. But as you know, they extended it in the *NPRI*
22 case to cases where, quote, a party seeks to protect the essential
23 nature of a government in which the three distinct departments
24 Legislative, Executive, and Judicial, remain within the bounds of
25 their constitutional powers.

1 Well, once again, I would respectfully commit, we don't
2 have a separation of powers issue here. Certainly they have pled
3 and allege that there's a constitutional violation by marijuana being
4 scheduled as a Schedule 1, but they don't plead anything with
5 regard to separation of powers, so I don't think the exception
6 applies even remotely.

7 THE COURT: Okay. Thank you. Do you have anything
8 further?

9 MR. KANDT: That's it.

10 THE COURT: You'll get a rebuttal certainly.

11 MR. KANDT: Thank you.

12 THE COURT: Thank you.

13 MS. RAMIC: Thank you, Your Honor.

14 The motion to dismiss filed by the Board should be denied
15 in its entirety. I do want to make clear that this case is a bout an
16 administrative agency that is passing regulations in violation of the
17 Nevada Constitution and our state laws.

18 So the core question here is, whether the Board of
19 Pharmacy can schedule cannabis as a Schedule 1 substance after
20 the Nevada Constitution was amended reflecting and recognizing
21 medicinal value of cannabis and requiring that it be distributed.
22 That is the core question here, Your Honor.

23 When we filed this case, it was done so with -- and it's
24 very simple, Your Honor. We are seeking to have -- make sure that
25 the Board is following within the confines of our laws and within

1 the most fundamental government document of the Nevada -- of
2 Nevada, the Constitution.

3 In terms of their allegation that we are not alleging that
4 they were denied the opportunity to use marijuana medically or
5 recreationally. Again, Your Honor, the questions here is, whether
6 the Board, by scheduling cannabis as a Schedule 1 substance, with
7 prerequisite findings that it has high potential for abuse and that it
8 has no medical value or that it cannot be distributed safely.

9 THE COURT: So it's a conjunctive and is that -- that's kind
10 of your argument?

11 MS. RAMIC: That's correct, Your Honor. So does it have
12 high potential for abuse and that -- and it has no medical value or
13 cannot be distributed safely.

14 They argue that that the accepted standard is the federal
15 standard, and that is simply not true, Your Honor. This is a state
16 agency who gets its favor from the Nevada State Legislature.
17 When they passed NRS 453.166 they specifically stated that when
18 the Board is considering whether to schedule something as a
19 Schedule 1 substance, it must be within those parameters.

20 Simply because the Nevada Constitution was amended,
21 recognizing that it does have medicinal value and authorizing its
22 distribution, that cannabis no longer fits within that requirement,
23 which is why it's violating the Constitution, Your Honor.

24 To its point that the ballot initiatives that have removed
25 cannabis as a Schedule 1 substance and that the Legislature didn't

1 pass any laws in terms of descheduling cannabis, those arguments
2 are irrelevant, Your Honor, simply. The fact that the Legislature or
3 the ballot initiative did not remove cannabis explicitly through a
4 specific language or a specific statute, does not in some way negate
5 the requirements to abide by the constitution.

6 And I think it's actually in the contrary, if you think about
7 it, the Legislature passing a statute descheduling cannabis wouldn't
8 make sense. They passed 453.166, they gave its parameters. And
9 because cannabis no longer fits within those parameters, there's no
10 need to for them file -- for them to then say, oh, we're going to pass
11 a statute decriminalizing it or descheduling it.

12 As to their argument in terms of that, no one petitioned
13 the Board to remove it, I want to make it very clear. There is no
14 rule, law, or statute that requires us to take those administrative
15 steps. There's nothing that indicates that the Board, itself, can
16 make the determination of whether or not their actions are
17 unconstitutional. And I think that's what's key here. We have
18 Nevada -- a Nevada case that indicates that that is just not a proper
19 remedy in this type of case.

20 THE COURT: What case is that?

21 MR. RAMIC: That would be *State Board of Parole*
22 *Commissioners vs. Second Judicial District Court*, Your Honor.
23 That was a Nevada Supreme Court in which the Board there filed a
24 petition for a writ of mandamus and they were challenging the
25 District Court's denial of their petition for modification of that

1 parole he's sentenced. And in essence, the respondents in that
2 case said, well, they could petition the Board and have it modified
3 through them, therefore, they have a proper remedy and writ is not
4 proper.

5 There, the Nevada Supreme Court said, that is actually not
6 an adequate remedy because they can't answer the core question
7 in the case, which is, what is the legal violation? And here, it's
8 simply the same matter. The Board --

9 THE COURT: So -- sorry.

10 MS. RAMIC: It's okay.

11 THE COURT: But I think I know what you're saying, but --
12 so your argument is essentially, like, in the *State Board of Parole vs.*
13 *Second Judicial District*, the issue or question here, kind of like it
14 was there, is a legal/constitutional issue not within the purview of
15 the agency but within the purview of the Courts?

16 MS. RAMIC: That is correct, Your Honor.

17 So essentially while that Board could possibly modify that
18 parole that he's sentenced, they couldn't answer the question of
19 whether they were acting unlawfully. And that's the same matter
20 here, Your Honor.

21 They next argue, Your Honor, that they were not stripped
22 of their authority to be able to regulate marijuana as a Schedule 1
23 substance, or marijuana in general. And that is not true as well,
24 Your Honor.

25 So when the initiative was passed, in terms of legalizing

1 marijuana recreationally, specifically in that initiative, the voters
2 voted upon and was later passed by the Legislature stating
3 specifically that they wanted cannabis to be treated in the same
4 manner as alcohol. The Board does not have any authority to
5 schedule or do anything in regards to regulating alcohol. And I
6 think that issue is further supported by the fact that when these
7 laws were passed, the authority to regulate, the authority to
8 determine how to distribute, that was given to the Cannabis Board
9 of Compliance. And so, at that point, their authority has been
10 stripped.

11 And I want to clarify something, Your Honor, because I
12 think there's a little bit of confusion in terms of the standards that
13 Respondent is using within this case in terms of their standing and
14 failure to state a claim arguments. When we filed the writ, when
15 we filed our initial -- initially in this case and filed the filings, we had
16 two components within one document.

17 THE COURT: Mm-hmm.

18 MS. RAMIC: We had the petition for writ of mandamus,
19 and then in the alternative, complaint for declaratory injunctive
20 relief. And so, these function differently as well as -- they have
21 different standards. And the Board has not applied these
22 standards, nor have attempted to differentiate in any way of these
23 standards.

24 Throughout their arguments here today and their motion
25 to dismiss and in their reply, they're using the federal standard for

1 standing, which is not appropriate. Nevada Courts have been very
2 clear, and in terms of standing for a writ of mandamus, the
3 petitioner has to have a beneficial interest in obtaining writ relief.
4 And then for a complaint that there has to be an actual justiciable
5 controversy. And both CEIC and Mr. Poole have standing under
6 these standards.

7 If you look at Mr. Poole, he does have a beneficial interest
8 in this matter. This is an individual who was convicted of
9 possession of a controlled substance for possessing marijuana.
10 And I think where the Board is confused, they cite to all these other
11 statutes that reference marijuana, but that is not how these
12 individuals are being charged. They're being charged with a felony
13 for possessing marijuana, simply because it is possession of a
14 controlled substance. And it's only due to the fact that the Board
15 has scheduled cannabis as a Schedule 1 substance. And that is
16 why it has applied to Mr. Poole, Your Honor.

17 His adjudication came after the law was passed for
18 medical marijuana to be legalized, and it came after our
19 Constitution was amended recognizing the medicinal value and
20 authorizing distribution of marijuana. At the point that the
21 Constitution was amended with these recognitions, the Board
22 should have removed cannabis as a Schedule 1 substance because
23 it is in direct contradiction to our Constitution. Because they failed
24 to do so, it allowed Mr. Poole to be charged unconstitutionally, so
25 he has that beneficial interest in having this removed.

1 And additionally, Your Honor, there is an actual judiciable
2 controversy here. The Board is seeking to continue scheduling
3 marijuana as a Schedule 1 substance. CEIC and Mr. Poole are
4 asking that it be found unconstitutional.

5 And CEIC, likewise, has a beneficial interest, Your Honor.
6 This is an organization that was formed with a sole mission of
7 helping individuals be able to apply for licenses so they can
8 participate in the cannabis marketplace. While they were helping
9 these individuals apply for these licenses, what they recognized
10 was that these -- some of these individuals were not -- didn't qualify
11 for the license merely because they had cannabis related
12 convictions. And because they had these cannabis related
13 convictions, they could not help them apply for these licenses. So
14 what they had to do was divert their resources then, and help them
15 apply for pardons and/or seal their records to be able to be eligible
16 for those licenses. So they have a beneficial interest because if it is
17 removed as a Schedule 1 substance, those convictions are
18 unconstitutional, and they no longer have to seek those pardons or
19 the sealing of their records.

20 And, Your Honor, the same reason applies as to why CEIC
21 has organizational standing as well. They had a mission, that
22 mission was frustrated, and they had to divert those resources. So
23 they had organizational standing as well.

24 I do want to touch a little bit on Your Honor's question in
25 terms of the *NPRI* case, Your Honor. And I believe that that

1 exception does apply here. The Board has stated that this is not a
2 separation of power issue, so therefore it's not remotely close. But
3 I would argue otherwise, Your Honor. The matter in that question
4 is, is the Executive Branch department acting within the bound of
5 its constitutional authority? And that is exactly what we have here.

6 The Legislature gave them parameters for which they
7 must abide by, and the question is, are they violating those
8 parameters by scheduling the cannabis as a Schedule 1 substance?
9 So I think it does apply here.

10 And, Your Honor, I can hit on why their failure to state a
11 claim motion must also be denied if you would like. They did not
12 hit much of that in their argument, but I can do so if the Court
13 would like me to go into that. We did include it in our pleadings.

14 THE COURT: Yeah. Thank you for that. I have reviewed
15 the briefs, and I at least somewhat agree with your statement. So
16 at least as of now, you can skip that part.

17 MS. RAMIC: Thank you, Your Honor.

18 While discussing the merits of the case and this is how
19 the Board has started off their arguments. They started off by
20 discussing the merits of the case, and I don't believe that is an
21 appropriate stance to take on a motion to dismiss. But because
22 they had taken those steps, I would like to address our stance
23 briefly, if I may, Your Honor?

24 THE COURT: Sure.

25 MS. RAMIC: And I really want to highlight the Board's

1 argument and their argument as to why their actions are not
2 unconstitutional are border on the line of absurdity. So they have
3 stated in their argument that the constitutional right to use
4 marijuana upon the advice of a physician in Nevada does not
5 establish that marijuana has accepted medical use and treatment in
6 the United States.

7 THE COURT: Yeah. That -- I didn't quite understand that
8 either.

9 MS. RAMIC: Exactly, Your Honor. So article -- they're
10 saying that Article 4, Section 38 says that use of -- this is titled, Use
11 of plant of genus Cannabis for medical purposes. This is something
12 that says -- which made the distribution of medical marijuana, and
13 it specifically outlines the type of illnesses that cannabis must be
14 available for treatment.

15 They're saying that this does not, in some way, indicate
16 that this is recognizing the medicinal value of marijuana. They're
17 putting forth this preposition that cannabis is such a dangerous
18 drug that it must be scheduled on its highest level of schedules
19 alongside heroin and above cocaine and meth, which are Schedule
20 2 substances.

21 And their actions are in no way admissible, Your Honor.
22 This is having dire consequence for individuals within this
23 community. Everyday these individuals are being charged with
24 possession of a controlled substance for possessing cannabis and
25 for selling cannabis and being charged with felonies. So this is

1 having consequences on these individuals.

2 And the language of the Nevada Constitution is very clear.
3 Cannabis does have medical value and it must be distributed. And
4 the Board has failed to amend its schedule to recognize the
5 changes in Nevada law. And that schedule is now in violation of
6 the Constitution.

7 It prolonged -- and they indicated this has been going on
8 for 22 years. A prolonged violation of our Constitution does not in
9 some way negate their requirements to abide by it or make it
10 unchallengeable. It makes them more egregious, Your Honor. So
11 yes, this has been going on for 22 years and I think the remedy, it
12 must be removed now because that is the proper remedy.

13 And finally, Your Honor, just briefly, I would like to --
14 because their motion and their arguments focus so heavily on the
15 merits of the case, we would ask the Court to consider their filings
16 as an answer, as well as their arguments today as their filings on
17 the motion to dismiss, and the reply as an answer, and enter a
18 ruling on the papers.

19 They have exhausted their arguments at this point, Your
20 Honor. And the issue has been briefed sufficiently. I don't see
21 what they can add anymore to guide this Court in its determination.
22 We filed this case in April. We are here now two months later with
23 possibly more delays while individuals are continuing to be
24 charged with these offenses unconstitutionally.

25 Given that this -- the law has been addressed, I think

1 making a ruling on the papers is appropriate. If Your Honor decides
2 that it is not, I think -- I would ask the Court to enter a TRO because
3 of these violations that keep happening and the prolonged delay.
4 And we would ask for you to enter a TRO requiring the Board to
5 remove cannabis and cannabis derivatives as Schedule 1
6 substances until Your Honor makes a determination on this case.

7 Thank you.

8 THE COURT: Thank you.

9 Mr. Kandt, any rebuttal?

10 MR. KANDT: Thank you, Your Honor.

11 First of all, to the extent the Court deems it appropriate,
12 you could always convert our motion to a motion for summary
13 judgment.

14 I think it's really important to note that Counsel keeps
15 using the term medical value. That's not the standard under NRS
16 453.166. Once again, the standard is accepted medical use in
17 treatment in the United States.

18 And I would respectfully submit that the constitutional
19 right of a Nevada patient to use marijuana upon the advice of their
20 physician does not necessarily equate to the standard of having
21 accepted medical use and treatment in the United States.

22 THE COURT: So when you --

23 MR. KANDT: The standard for -- I'm sorry, Your Honor.

24 THE COURT: No, that's okay. So when you're saying --
25 your argument is essentially -- and certainly correct me if I'm

1 misinterpreting this part of it -- but that just because marijuana is
2 approved for medical use in Nevada, it does not necessarily mean,
3 you know, it complies with the -- it needs approval -- the medical
4 use approval in the United States as a whole? Is that kind of your
5 argument there or --

6 MR. KANDT: Thank you, Your Honor. Yes. There's a
7 statutory procedure -- an administrative procedure on the federal
8 level for reviewing substances under the Federal Controlled
9 Substances Act and determining whether placing them on a
10 schedule, or removing them from a schedule, or rescheduling them
11 is appropriate. And there have been numerous petitions from
12 interested parties on the federal level to the DEA, which has
13 regulatory oversight over those schedules on the federal law to
14 review the scheduling of marijuana. And then there's an entire
15 administrative process on the federal level to have the FDA review
16 and make certain determinations based upon prespecified criteria.
17 And so, that's the standard when you look on the national level.
18 How is it treated on the national level? That's how you determine
19 whether it has, quote, accepted medical use and treatment in the
20 United States.

21 And once again, on the national level, it remains as
22 Schedule 1, under federal law. All the states recognize that
23 designation, even those states that have authorized marijuana for
24 medical use. I'm not aware -- and Counsel can correct me -- of a
25 single state that has removed marijuana from Schedule 1. But

1 nevertheless, that's the standard. And that's why, once again, I
2 respectfully submit that we can have marijuana in Schedule 1 and
3 it's not violating the constitution.

4 And once again, there's no allegation here that any
5 Nevada patient has been denied the opportunity to use marijuana
6 upon advice of their physician. So the constitution is not being
7 violated. But when we get to the administrative process under
8 state law, I think it is very important that they've never petitioned
9 the Board because the Legislature did provide a statutory process
10 by which, drugs could be placed in one of those five schedules, and
11 it's a very specific process.

12 I think it's important to note, one, marijuana's schedule in
13 Schedule 1 prior to the ballot initiatives, so that's relevant. But
14 once again, there's still a process to review the current scheduling
15 of marijuana that the petitioners don't want to avail themselves of.

16 I think it's important to note that under the statutory
17 process for scheduling drugs in NRS 453, there are some specific
18 provisions that say, the Board shall place a substance in a schedule
19 in conformance with the way the feds have placed the substance
20 unless it makes some specific determinations that the State of
21 Nevada should deviate from the federal schedule, but that's a
22 process. And that process has never taken place, and the
23 petitioners have never availed themselves of that process. And I do
24 think that's very relevant.

25 Instead, they would ask this Court to circumvent the

1 process to make those determinations on the fly right here, and I
2 don't think that that's appropriate on the relief that they seek.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 MS. RAMIC: Your Honor, may I have a brief rebuttal?

6 THE COURT: No. Thank you for asking, but generally,
7 it's, you know, movant, opponent, movant unless there's a reason
8 to depart from that standard. So I'm going to answer that question
9 in the negative.

10 But I appreciate you're asking because sometimes
11 attorneys just don't ask and go for it.

12 MS. RAMIC: I did want to provide clarification in terms of
13 their --

14 THE COURT: So you asked, I said no. But thank you.

15 The Court is going to deny without prejudice the motion
16 to dismiss for lack of jurisdiction and failure to state a claim. And to
17 give a preview before I go into some of the reasons. We're then
18 going to have after this, this is not the end of the case to be clear,
19 we're going to talk about answer and briefing after this.

20 But the Court does find and rule on the standing issue that
21 the petitioner/plaintiffs do have standing on both the petition for
22 writ of mandamus and the complaint for declaratory and injunctive
23 relief.

24 And so, is it Ramic? Is that --

25 MS. RAMIC: Ramic.

1 THE COURT: Trill my R a little bit.

2 MR. RAMIC: Happens often, Judge. No problem.

3 THE COURT: Ms. Ramic and Ms. Romero, you'll prepare
4 this order. Submit it to Mr. Kandt for review and approval.

5 So they do have standing and that's the general issue that
6 I'm focused on today. The substance of the remaining arguments
7 will be addressed in, at the very least, briefing here in the future.
8 But to go through -- so the denial is without prejudice to be clear if I
9 hadn't said that already.

10 I do agree that the motion to dismiss, you know, was a
11 proper method of seeking relief from the Court, so I agree with
12 Respondents/Defendants argument that a motion to dismiss is
13 proper under NRS 34.300. You know, which incorporates a Nevada
14 Rules of Civil Procedure and/or in the alternative, the very least, I
15 broadly interpret under 34.210 an answer. So construe that
16 liberally in the motion to dismiss as a fair and proper response. So
17 I at least disagree on that particular point with Petitioners/Plaintiffs.

18 Now having said that, I consider parts of the arguments
19 here, I will not be addressing the substance because I think -- and
20 include all this in the order certainly -- the substantive arguments
21 on failure to state a claim or dismissal under that standard weren't
22 appropriate whether under summary judgment or, you know,
23 because I don't want to -- I think this will be an issue that resolves
24 with briefs but I don't want to state at this early juncture that we're
25 not going to have a trial. That's always a possibility. But the

1 remaining arguments other than [indiscernible] addressed,
2 following the answer procedures under the statutes and rules of
3 civil procedure.

4 So I do find, like I said, Plaintiffs to have standing, and
5 that's under NRS 34.160, NRS 34.170 applying the arguments raised
6 by Petitioners and Plaintiffs understanding -- or not understand -- as
7 of standing the *Heller* case, the *Amerco Development* case, *Bennett*
8 *Case*, and the *NPRI vs. Cannizzaro* case, to me, it is clear that
9 Petitioners/Plaintiffs do have standing under Nevada law because
10 that -- and to be clear, I accept that argument. We're here in
11 Nevada State Court. I'm bound by Nevada law. Federal law may
12 take a restrictive view of standing, but we're here in Nevada State
13 Court. Which especially, under the *NPRI vs. Cannizzaro* case takes
14 -- bless you -- takes a more expansive approach perhaps on
15 standing.

16 Regarding, you know, all the other types of arguments --
17 bless you, again -- we'll be addressing those in further briefing.

18 The -- let's see. I'm trying to think. I had more notes
19 somewhere. Bear with me.

20 So the Court incorporates the arguments that -- and again,
21 this is on a motion to dismiss standard that even the standing
22 ruling is on a motion to dismiss standard accepting all facts as
23 pleaded as true. And so it's certainly without prejudice as to any
24 further pleading or motion practice. But the Court takes into
25 account and incorporates the arguments set forth in the

1 petitioner/plaintiff's opposition. The standing argument that begins
2 on page 9 goes through page 17.

3 At this early juncture, the substance, the failure to state a
4 claim, denied without prejudice. It's more appropriate on the
5 briefing type of scheduling that's contemplated to some extent
6 already by the parties.

7 The couple things that were raised in argument, if not
8 necessarily the briefing, will need to be included in the order.
9 Petitioner/Plaintiff's request for a temporary restraining order is, at
10 least as far as I could tell by preparing, is not set forth in the
11 briefing, and so it's not appropriate for me to issue a TRO this
12 morning. Certainly that's without prejudice as to any further
13 motion practice. But not in the briefs, I'm not going to grant a TRO
14 that the other side has not had notice and an opportunity to be
15 heard on.

16 Let's see. I'm going to decline -- I'm trying to choose my
17 words carefully. I do acknowledge both sides thoroughly briefed a
18 number of the substantive issues; however, I'm going to decline
19 ruling on that for reasons I stated.

20 Oh. In terms of timing, because that was raised in
21 Petitioner/Plaintiff's argument, the Court does note that the parties
22 filed a first stipulation proposed order setting briefing schedule on
23 June 1st, and I believe all parties agreed to the timing of the
24 briefing set fort in there. And I certainly did when I signed the order
25 as well, so I don't see any issue in terms of, well, if there's been

1 some delay or anything like that, it's raised in oral argument by
2 Petitioners here. I mean, they agreed on the briefing schedule. So I
3 can't really complain about timing.

4 So briefing schedule that the parties agreed to June 1st,
5 looks like -- assuming that it would potentially be necessary if
6 Respondent/Defendant file and serve an answer to the petition
7 within 14 days of entry of the order denying now, without
8 prejudice, a motion to dismiss. And then the reply, and then we'll
9 have a hearing, two weeks maybe to prepare that order. You know,
10 a week to prepare it, submit it to Mr. Kandt, a week to go back and
11 forth and come up with an agreed upon order. If you all happen
12 not to be able to agree, you can submit competing orders, but
13 hopefully you'll be able to agree. But then I'll get it signed and 14
14 days after that the answer would be due.

15 Does that -- I mean, this was a stip back on June 1st. I
16 assume the timing is still okay with both sides, but if either side has
17 an issue, now is the time to let me know.

18 MR. KANDT: That's fine, Your Honor.

19 MS. RAMIC: And, Your Honor, may I just clarify. You are
20 asking the Board to file -- since you are ruling on the motion and it
21 was denied, you are asking them to file an answer within the two
22 weeks?

23 THE COURT: Yeah.

24 MS. RAMIC: Okay.

25 THE COURT: Yeah. Once you do the notice of entry of

1 order. So basically two weeks from today you should be able to
2 come up with the order itself between, you know, you'll draft it,
3 submit it to Mr. Kandt for review and approval. He may have some
4 comments. He may go back and forth. So I expect that'll take
5 about two weeks. And then what I'd be inclined to do is set an in
6 chambers status check two weeks from today to see if we have --
7 actually two weeks and one day. So what would that be?

8 THE CLERK: Court's indulgence.

9 THE COURT: Sure.

10 THE CLERK: So it'd be -- you don't have a session --

11 THE COURT: Oh, just do two weeks then. Yeah. That's
12 fine.

13 THE CLERK: All right. So it would be July 27th.

14 THE COURT: Okay. So July 27th in chambers will just be
15 for me to double check and make sure I have an order. If there, you
16 know, happen to be some delays or issues, just reach out to my
17 chambers and let us know if, you know, if you need an extra week
18 or something like that.

19 But July 27th, we'll check in chambers and see if we have
20 an order. As soon as we have an order and the notice of entry is
21 done, then Respondent/Defendants will have their 14 days to file
22 their answer. And then after that answer, Petitioner/Plaintiffs will
23 have 7 days for a reply. And then once that reply is filed, we'll do a
24 notice of hearing. That'll be about 7 days after that reply is filed.

25 Normally I just give you particular days, but based on

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your stip, you need to make sure you have that order first.

Any questions?

MR. KANDT: No, Your Honor.

MS. RAMIC: No, Your Honor.

THE COURT: Okay. Thank you all very much.

MR. KANDT: Thank you.

MS. RAMIC: Thank you, Your Honor.

[Proceeding concluded at 10:24 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Brittany Amoroso
Independent Transcriber

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DISTRICT COURT
CLARK COUNTY, NEVADA

CANNABIS EQUITY AND)	CASE NO.: A-22-851232-W
INCLUSION COMMUNITY)	
(CEIC),)	DEPT. XV
)	
Plaintiff,)	
)	
vs.)	
)	
STATE OF NEVADA ex rel.)	
BOARD OF PHARMACY,)	
)	
Defendant.)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE
MONDAY, JANUARY 9, 2023

**RECORDER'S TRANSCRIPT OF HEARING RE:
RESPONDENT/DEFENDANT'S MOTION TO STAY JUDGMENT AND
ORDER PENDING APPEAL; MOTION FOR ATTORNEY FEES AND
COSTS**

APPEARANCES:

For the Plaintiff:	CHRISTOPHER PETERSON ESQ. SADMIRA RAMIC, ESQ.
For the Defendant:	PETER K. KEEGAN, ESQ. WILLIAM B. KANDT, ESQ.

RECORDED BY: MATTHEW YARBROUGH, COURT RECORDER

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Las Vegas, Nevada; Monday, January 9, 2023

[Proceeding commenced at 9:58 a.m.]

THE CLERK: -- Nevada ex reL. Board of Pharmacy.

MS. RAMIC: Good morning, Judge.

MR. PETERSON: Good morning, Your Honor.

Chris Peterson and Sadmira Ramic from the City

representing CEIC and Antoine Poole.

THE COURT: Good morning.

MR. KANDT: Good morning, Your Honor. Brett Kandt,
bar number 5384, representing the Nevada State Board of
Pharmacy, public entity of the State.

THE COURT: Good morning.

MR. KEEGAN: Good morning, Your Honor. Peter Keegan

THE COURT: Okay. Good morning.

Bear with me a second. You all can sit down if you want.

[Pause in proceedings]

THE COURT: Okay. So I think, hopefully, we have two
motions on, Respondent's/Defendant's Motion to Stay Judgment
and Order Pending Appeal and Petitioner's Motion for Attorney
Fees and Costs.

Is that what you all have, too?

MR. PETERSON: That's correct, Your Honor.

THE COURT: Good. Okay. I think although the fees was
filed first, I think I want to hear the motion to stay first.

1 And welcome arguments beginning with Mr. Kandt.

2 MR. KANDT: May I approach, Your Honor?

3 THE COURT: Sure.

4 MR. KANDT: Just to hear you better.

5 THE COURT: Yeah. Either one is fine.

6 MR. KANDT: Go ahead and present opposition on the
7 attorney's fees motion?

8 THE COURT: Oh, no, no. I'm sorry if I misspoke. I
9 apologize. If I said that, I totally meant the opposite.

10 The motion to stay judgment. Sorry.

11 MR. KANDT: Certainly. Thank you, Your Honor.

12 Obviously, the four considerations that the Court takes
13 into account on a motion to stay and the first three are somewhat
14 interrelated here in terms of whether the object of the appeal would
15 be defeated without a stay, whether the quote, unquote, Board,
16 would suffer irreparable injury, and then the effect of a stay and a
17 potential or irreparable injury to the petitioners in this matter.

18 And, you know, just to preface it, this is a landmark ruling.
19 And it's got significant impact and it's got significant outside
20 beyond the constitutional right of a patient to use marijuana upon
21 the advice of a physician because that wasn't at issue here.

22 The petitioners didn't come to the Court alleging that they
23 were being denied the right to use marijuana upon the advice of the
24 physician, nor did they come to the Court alleging that they were
25 being denied the right to engage in the recreational use of

1 marijuana as authorized by law. And so, as the Court weighs
2 whether to grant a stay, I would just -- I would respectfully submit
3 that that's important. Nobody here is being denied their right to
4 use marijuana as authorized by the two. Both are valid initiatives.

5 When we look at the issue of public interest, which both
6 parties in weighing in on the issue of a stay have invoked public
7 interest -- and I do believe that public interest is very relevant to the
8 Court's consideration of a stay. And when we look at public safety,
9 the effect of this significant ruling is the effect -- once again, outside
10 the lawful use of marijuana and delves into activities that may or
11 may not be unlawful, and the impact of the ruling on those
12 activities, and it creates some legal uncertainty, and that legal
13 uncertainty can pose a significant risk to the public absent a stay.

14 The State, in support of its motion, submitted a
15 declaration from law enforcement attesting to the impact --

16 THE COURT: Bear with me. I'm sorry. Let me pull that up
17 because I had the briefs printed, just not the exhibits printed.

18 MR. KANDT: It was submitted in the reply.

19 [Pause in proceedings]

20 THE COURT: Okay.

21 MR. KANDT: Okay. Yeah. And it was submitted in the
22 reply and it notes the impact of the Court's ruling on law
23 enforcement and the law enforcement's ability to police certain
24 activities that, up to now, have clearly been unlawful with regard to
25 marijuana because they're tied to criminal offenses and

1 prohibitions regarding controlled substances. And I'm not going to
2 reiterate all those statutes that were cited, and they're not
3 necessarily an exhaustive list, but I highlighted some of them in our
4 motion for a stay and the reply. But, you know, some of them
5 involve firearms. And I think, certainly, we would all agree that
6 somebody wielding a firearm under the influence of marijuana
7 poses a significant risk to public safety.

8 And so, that's just one example from law enforcement
9 and their efforts to protect the public on the Las Vegas Strip, one of
10 the most visited places, not only in Nevada or the United States,
11 but the world. And why they have concerns and why a stay would
12 certainly be a way in favor of the public interest pending review at
13 the appellate level.

14 And so, once again, the issue is not irreparable injury to
15 the Board. The Board's interest is the public interest. The Board is
16 a public entity created to protect and serve the public and that's the
17 issue here.

18 With regard to the petitioners and whether they would
19 suffer an irreparable injury, once again, nobody's being denied the
20 right to use marijuana for medical use or recreational use as has
21 been authorized. They, once again, have some prior marijuana
22 convictions. But, you know, a couple things, once again, those
23 convictions are already on the books. Their validity is not within
24 the scope of this action. Both the Court in its order --

25 THE COURT: I was hopefully clear on that point. Yeah.

1 MR. KANDT: Well, the Court and its order and the
2 petitioners acknowledge that that's not really within the scope of
3 this action.

4 This petition was limited strictly to whether the continued
5 designation of marijuana in Schedule 1, violates the constitution or
6 NRS 453.1662. And then, two, whether the Board had any ongoing
7 jurisdiction to regulate marijuana after the enactment of Title 56.

8 So for purposes of considering the stay, the issue of prior
9 convictions and their validity, I don't think really comes to bear, but
10 even if it does, I would respectfully submit that weighing those
11 interests, weighs in favor of a stay and public safety.

12 And then on the fourth issue that the Court considers
13 when presented with a motion for a stay, the whole likelihood of
14 success on the merits really in this instance is whether the State
15 has made a substantial case on the merits involving serious legal
16 questions. And I respectfully request that we have. These are two
17 issues of first impression that are of significant public interest.

18 We respectfully submit that the constitutional provision,
19 Article 4, Section 38, is susceptible to a reasonable interpretation
20 that avoids a direct conflict with Chapter 453 because, once again,
21 nobody's being denied the right to use marijuana upon the advice
22 of a physician due to marijuana's continued designation in
23 Schedule 1. And they're able to use marijuana regardless of
24 whether or not marijuana has an accepted medical use in treatment
25 in the United States.

1 And then secondly, the issue of whether the enactment of
2 Title 56 completely deprived the Board of jurisdiction to regulate
3 marijuana in any way, shape, or form. There are a lot of inferences
4 on this point. Obviously, case law establishes that repeals by
5 implication are not favored, and that, once again, weighs in favor of
6 maybe our state's highest court reviewing this issue. And just the
7 questions that arise that if the Legislature intended Title 56 to
8 occupy the entire field, why are there still so many provisions
9 related to marijuana in Chapter 453? Why were they not removed
10 and placed in Title 56? Where they then -- they would clearly be
11 within the jurisdiction and the authority of the Cannabis Control
12 Board.

13 And why are the criminal offenses specific to marijuana
14 left in the Chapter of NRS that regulates controlled substance? The
15 -- you know, the Nevada Controlled Substances Act.

16 And so, with that, we respectfully request that the Court
17 grant a stay pending the appeal.

18 THE COURT: Well, thank you very much.

19 MS. RAMIC: Thank you, Your Honor.

20 We would ask this Court to deny the motion to stay.
21 Counsel here has focused heavily on the fact that it is crucial that
22 we have not, in a sense, stated that no one is being denied the right
23 to use cannabis recreationally or medically. But that's actually
24 irrelevant to the determination of this case. The issue here is that
25 they are -- that they were scheduling cannabis unconstitutionally

1 and individuals were being charged unconstitutionally as a result of
2 that scheduling. And that was in direct contradiction to the
3 Constitution amendment that was passed. So I think to that point, I
4 don't think it's crucial to this case. I don't think we need to rehash
5 what we went through throughout this case, but I did want to point
6 that out, Your Honor.

7 And as outlined in our motion and as Counsel has stated,
8 there are four elements when determining whether to grant a
9 motion to stay. And we outline in our motion that they have not
10 met those four elements.

11 As it pertains to the first two elements, the first being that
12 the purpose of the appeal will be defeated and that the Board will
13 suffer irreparable harm. You see throughout their motion that
14 they're focusing on the fact that they have to follow this process
15 and then they will have to expend resources and time to place
16 cannabis back on the schedule if it is taken off the schedule.

17 And one, they did not deny that they are able to place
18 cannabis back on a schedule. I think that's crucial to the word,
19 irreparable here. So they're not suffering irreparable harm in that
20 aspect.

21 And Nevada Courts have stated that mere injuries, no
22 matter how substantial they are in terms of time and resources, is
23 not enough to show irreparable harm. And in our opposition to
24 their motion, we did highlight those arguments, Your Honor.

25 The Board did come back in their reply -- and I would like

1 to point out, it was the first time that we heard this argument in
2 terms of safety -- and throughout this case, we have not heard
3 anything in terms of safety to law enforcement or the Strip. It was
4 not raised in their initial motion for a stay, but now they're arguing
5 that somehow cannabis not being a controlled substance is a safety
6 issue and a safety issue to the Strip.

7 And they offer several statements in that connotation.
8 One, is that they state that the Board sits in the shoes of the public.
9 They represent the public, which is quite odd because they are
10 actually in direct contradiction of the public. The public is the one
11 that determined that our constitution should be amended. They're
12 the ones that voted on this. They're the ones that pass this
13 amendment recognizing that cannabis does have medical value and
14 should be distributed to individuals who have certain illnesses. So
15 they can't stand in the shoes of the public representative then when
16 they're in direct contradiction of what the public voted on.

17 And second, they claim -- and this is directly from their
18 opposition -- in their motion, Your Honor, sorry. And as well as
19 here in their argument is they focus on the fact that, in the event
20 that relevant offenses are committed while marijuana's designation
21 as a controlled substance is not in effect, they state that dangerous
22 criminal activity will go unabated and unpunished, and the public
23 will suffer consequences.

24 So what they are asking this Court to do is to permit them
25 to keep scheduling cannabis unconstitutionally, and thereby permit

1 the application of unconstitutional statutes to offenses that are only
2 intended to apply to controlled substances. And the only support
3 that they provide in this aspect is this affidavit of the Captain. And,
4 I think, one, that affidavit is not proper. One, because it's being
5 raised -- it was not raised in their original motion to stay; it was
6 raised in their reply. Two, I don't think it's relevant. And the reason
7 I say that is because, Your Honor, this -- if you look at the affidavit
8 and what it states, it does not, in any way, provide any evidence
9 that cannabis is unsafe. It doesn't provide any statistical --

10 THE COURT: Yeah, I mean, we'll hear it in the rebuttal,
11 but even, you know, let's assume for purpose of this argument, that
12 I'll consider the declaration despite, as you rightfully point out, not
13 being in the motion, but, I mean, it seems to ignore, I mean, even
14 without my ruling, you know, I mean, the State points out, well
15 there's no denial of medical or recreational use. And meanwhile,
16 you know, the -- I forget what his title is.

17 MS. RAMIC: I think its Captain Bitsko, Your Honor.

18 THE COURT: Captain -- oh, yeah, yeah. I was looking in
19 the body, but yeah.

20 But, I mean, talks about how, you know, dangerous it is
21 but even without my ruling, nobody's allegedly being denied
22 medical or recreational use, so I'm struggling to make sense of it, I
23 guess.

24 MR. RAMIC: And yes, Your Honor. And that's precisely
25 our point in that within this affidavit, like I said, there's nothing

1 stated that cannabis is unsafe. Their -- there's no statistical data
2 that they provide. There's no numbers that they rely on. It's mere
3 opinion of this Captain, and the fact that they can potentially use
4 cannabis to confiscate weapons is not irreparable harm.

5 I think, if anything, this affidavit serves as evidence of the
6 harm that individuals like CEIC and Mr. Poole will continue to
7 suffer. As they pointed out in their motion that individuals -- we
8 stated that the individuals will continue to be charged if the stay is
9 granted. They say this is purely speculative, but I think their
10 affidavit serves as evidence that this is not speculative --

11 THE COURT: The affidavit --

12 MS. RAMIC: -- the Captain is telling the Court, this is what
13 we want to do. This is what we continue to do, and without your
14 stay, we can't continue to do it.

15 And so, I mean, this is purely new in their reply. If Your
16 Honor would be inclined to rely on this declaration to make this
17 ruling, I think, maybe an Evidentiary Hearing may be possible, and I
18 think at this point, it's necessary. But we really don't know what he
19 relied on when making those statements, Your Honor.

20 And I would kind of hit each point just because the Board
21 kind of bunched them all up together. But in terms of the
22 irreparable harm for the plaintiffs in this case and the petitioners in
23 this case, the Board has not met their burden to show that they
24 would not suffer irreparable harm.

25 CEIC, as the Court has ruled in terms of their standing,

1 stands in the shoes of the public contrary to what that Board is
2 arguing that they do.

3 Your Honor found that they have standing under the
4 public importance doctrine in *NPRI*, so they stand in the shoes of
5 the public. And as we just pointed out, those individuals will
6 continue to be charged unconstitutionally under these statutes if
7 the stay is granted.

8 And as it applies to Mr. Poole and individuals who have
9 already been charged, yes, Your Honor, has not stated that those
10 unconstitutional convictions are nullified. But that doesn't mean
11 that these individuals don't have any recourse as a result of this
12 ruling. They can still go to a judge and ask for their
13 unconstitutional conviction to be overturned if they wanted to.
14 Something they cannot do with if the motion to stay is granted.

15 And then finally, as to their last point regarding -- there
16 has been a substantial case in the merits that they have met. As
17 much as the Board emphasizes that this amendment is open to two
18 different interpretations, that is not the case. I think the
19 amendment is very clear in that cannabis does have medical value
20 and that it can be used medically for treatment. I think that is very
21 clear. I don't think it's open to interpretation as -- in regards to that.

22 And so, Your Honor, I think the essential argument to the
23 Board throughout this case has been, you know, we've been doing
24 this for a long time, and now they're asking this Court to permit
25 them to do it even longer and to continue this unconstitutional

1 regulation, continue unconstitutional charging of individuals. And I
2 think that points to why the stay should be denied. And we would
3 respectfully ask the Court to do that.

4 THE COURT: Thank you very much.

5 MR. KANDT: I think just briefly, Your Honor, and we both
6 made our points. I don't want to quibble about the declaration
7 being submitted. It's part of the reply. I think both parties are
8 invoking the public interest in their respective arguments here. And
9 simply, when the petitioners invoked the public interest in their
10 opposition, and their interest in preventing unconstitutional --
11 potentially unconstitutional criminal charges and convictions, I felt
12 it appropriate to raise the issue of public safety, which is certainly in
13 the public interest as well.

14 And I think Counsel's last argument kind of touches upon
15 it. And maybe this is the quandary that the Court's confronted with,
16 but if there's not a stay and then you have individuals seeking to
17 have their -- convictions overturned, and then on appeal, something
18 changes, and a determination is made that results in those
19 convictions were not unconstitutional, I -- you've kind of, at that
20 point, trying to unscramble an egg, as I put it, in our motion.

21 And that's why in pertinent part we feel, given that
22 nobody's being denied the right to use marijuana upon the advice
23 of a physician, nobody's being denied the right to engage in the
24 recreational use of marijuana. We think it -- in everyone's best
25 interest, to stay the judgment pending review on appeal.

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THE COURT: Well, thank you very much.

The Court is going to deny the motion to stay for the reasons articulated in the opposition. I'm going to go over some of those, maybe add some as well, but the standard is appropriately set forth in detail on page 3 of the motion, there under the legal standards. So when you prepare the order denying, submit it to Mr. Kandt for review and approval, put that legal standard there, I mean, that's spot on, accurate.

So the, you know, they appropriately filed in front of me in the first place. When appeals taken by the State is that it's here, no bond or obligation security would be required. And then the Court considers the factors in NRCP 8(c) and the case is interpreting it such as *Mikohn v. McCrea* case.

But the application of the factors here, I believe, and so rule, does not merit a stay here. The -- as set forth on page 3 of the opposition, the object of the appeal will not be defeated. I mean, there's an administrative process, as the State rightfully points out, that the State may have to comply with if the appeal is successful, but that's not a way of defeating the object of the appeal.

The Board has not demonstrated it will suffer irreparable injury or serious injury if the motion to stay the judgment and order is denied.

The, you know, when you're arguing about the public interest on behalf of the Board, my first thought was, well, that very much cuts both ways, and in fact, as -- yeah. That was brought up

1 in argument and opposition. I mean, to me -- and put this in the
2 order -- I mean, the will of the people of the State of Nevada has
3 demonstrated as I think I've already found, but, you know, and what
4 they voted on. And that's, to me, the, you know, this public
5 interest, that's -- they voted. They, meaning the citizens of the State
6 of Nevada.

7 The real party in interest here is the Board and as I've
8 already found, you know, I -- the Board's acted, you know, whether
9 you call it improperly, erroneously, or what have you, as the Board
10 acknowledges, there's -- as the board acknowledges -- there's an
11 administrative process that could be undertaken if the appeal is
12 successful, so that factor.

13 And as pointed out by the Board, even though I think in
14 opening argument, you know, sometimes in these factor analysis,
15 the factors blend together a lot. So it's all interesting as a side note.
16 You know, you have these one, two, three, four factors, and several,
17 if not all, overlap and interplay.

18 Let's see.

19 So the Board hasn't demonstrated it would suffer
20 irreparable or serious injury if the stay is denied as pointed out key
21 words in this factor are irreparable or serious, mere injuries,
22 however, substantial in terms of money, time, energy necessarily
23 expended in absence of the stay are not enough to show
24 irreparable harm. That's quoting from the *Fritz Hansen* case.

25 The -- yeah, the argument there on pages 4 and 5 in the

1 opposition, the Court incorporates the -- whether -- so factor three
2 now, under the real party interest on the other -- CEIC, Mr. Poole,
3 the public will suffer irreparable harm or injury. I mean, I already
4 found these are, as the petitioners/plaintiffs point out, these are
5 constitutional violations and actually, the declaration of the Captain,
6 you know, supports this argument, and by petitioners said, hey,
7 granting the stay will just lead to more constitutional violations,
8 which I think supports denying the stay.

9 You know, as I commented and include this in the order, I
10 mean, well -- backing up a little. So it is not proper to provide new
11 evidence in a reply that hasn't even really been touched on in the
12 motion, and that's the case here with the Captain's declaration not
13 withstanding that. So put that as one of the reasons, but not
14 withstanding, I considered a substance and as I commented on the
15 substance, that declaration seems to indicate, you know, we want
16 to keep -- especially in light of what I've already said, these were
17 constitutional violations.

18 Captain's saying, well, we want to keep continuing to
19 enforce these constitutional violations because of public safety.
20 Well, that actually supports a denial of the stay.

21 The -- I have to assume as a judge and whether it's fair or
22 not, it's my duty as a judge to assume the people of Nevada knew
23 what they were voting for. And what they voted for is, you know,
24 there's a medical use for marijuana that necessarily, as I've already
25 ruled, that removes it from that Schedule 1.

1 Let's see.

2 Yeah, so the public interest argument cuts more in favor
3 of denying the stay as I've -- I keep talking about with the will of the
4 people, with the public voters, the citizens have done.

5 I agree. This is a landmark ruling. It's a first impression
6 ruling. Put that in there, even that's fine. But that doesn't really
7 address whether a stay should be granted or not. The factors are
8 what the Court considers.

9 As the State points out, no single factor is positive, and if
10 one or two factors are especially strong, they may counterbalance
11 other weak factors. Well, here to me, the strongest factor here, and
12 I may sound like a broken record, but -- is what the people of the
13 State of Nevada did and how they voted and approved.

14 Whether the Board has shown that it's likely to prevail on
15 the merits of the appeal, it's a hard factor when you're the one
16 appealing to a judge who's already ruled against you. I
17 acknowledge that, but I do consider it. I -- to me, notwithstanding
18 being a, you know, issue of first impression, to me it was clear --
19 crystal clear, you know, that the petitioners were right.

20 There are other issues not in front of me that are murkier,
21 but the issues in front of me, to me, are clear. And so, I think that
22 factor cuts against the granting a stay.

23 Let's see.

24 Just double checking to make sure I didn't skip anything.

25 So prepare a detailed order and submit it to the State for

1 review and approval on that one. Okay.

2 So now, Petitioner's Motion for Attorneys Fees and Costs.
3 So welcome arguments beginning with Petitioner.

4 MR. PETERSON: Yes, Your Honor. I want to start my
5 simply pointing out this issue before the Court and that is simply a
6 matter of pure law. It didn't appear that there was any
7 contradiction in the opposition filed by the Board regarding the
8 application of *Brunzell* factors. It's saying -- like they simply point --
9 ,argue that we didn't have -- there wasn't a statute on point
10 authorizing dispersal of attorney's fees, or in turn, we were not
11 entitled to them under special damages.

12 So I want to also be clear about something else. As far as
13 our argument is concerned, we are only arguing, one, that we're
14 entitled to attorney's fees under NRS 34.270, or in the alternative, if
15 the Court finds that we're not eligible under that, that we're eligible
16 for them as special damages. We are not arguing that we're
17 entitled to attorney's fees pursuant to NRS 18.010. We didn't say
18 that in the original motion. We have not said that in the reply. So I
19 want to be very clear about that.

20 So, I think, one thing that is not in -- also not in dispute, is
21 that there are two ways that a prevailing party can recover
22 attorney's fees. Either, one, there's a statute, rule, or agreement
23 authorizing dispersal, or two, recovery of attorney's fees as special
24 damages.

25 Now, one of the key cases here, of course, is *Sandy Valley*

1 *Associates*, that's something that is cited by both parties. And
2 there's a very helpful set of footnotes, footnote 6 and footnote 7. It
3 seems at that point, the Court was concerned because they were
4 given a jurisprudence and getting a little confusing about --

5 THE COURT: Bear with me a moment here.

6 MR. PETERSON: Yes.

7 THE COURT: Let me pull up -- because I reread through
8 that but let me pull it back up here.

9 Yeah, I've read *Sandy Valley* numerous times but it's
10 always good to reread and then, you know, I -- as you're arguing, I
11 would like to hear -- because it seems to me that the Nevada
12 Supreme Court has subsequently limited *Sandy Valley* in more than
13 one case. So while you're arguing, consider that, too. But, go
14 ahead.

15 MR. PETERSON: Yes, Your Honor.

16 So I think, going back to pointing specifically to footnote 6
17 and footnote 7, because those were offered to clarify when is it --
18 when are fees being recovered pursuant to a statute, rule, or
19 agreement versus when are they be recovered as special damages
20 and offered specific examples of when this was occurring.

21 Now, I'm touching really quickly, though, about *Sandy*
22 *Valley*, it appears that most of the limitations related to *Sandy*
23 *Valley* have been related to when special damages can be
24 recovered. It doesn't appear that the Court has really addressed --
25 suggested that *Sandy Valley* was incorrect. And the example did --

1 gave of statutes, rules, and agreements that would allow recovery.

2 And the reason why -- and going now into the first
3 argument that we're entitled to recovery pursuant to NRS 34.270.
4 Now, NRS 34.270, essentially allows for the recovery of damages
5 and costs by an applicant if the applicant receives a judgement
6 related to a writ of mandamus. It's under the same chapter. And in
7 turn, looking at the opposition, it appears that the Board gave a
8 fairly brief opposition here -- or argument here, but it seemed like
9 the argument was that because it doesn't have the magic words,
10 attorney's fees in there, we wouldn't be entitled to the recovery of
11 attorney's fees.

12 However, this is not in line with what we're seeing in
13 *Sandy Valley* and the examples that we see under footnote 6.
14 Specifically, when we look at, for example, *Artistic Hairdresser*,
15 recovery there was under NRCP 65. And if you look at NRCP 65, it's
16 specifically the provision that allowed recovery there, which would
17 be subsection C, there is no reference whatsoever to attorneys fees
18 in that situation. All right.

19 In turn, they also referenced *James Hardie Gypsum*. If
20 you look at the contractual language that's at issue here.

21 THE COURT: Let me pause you.

22 So NRCP 65 being the offer of judgment rule --

23 MR. PETERSON: That's the injunctions and restraining
24 orders.

25 THE COURT: -- injunction. Sorry. Sorry. Yeah.

1 MR. PETERSON: And so, that'd be subsection C that was
2 at issue there.

3 THE COURT: Okay.

4 MR. PETERSON: Yeah. So in that situation, it's important
5 to note that that was given as an example of where a statute
6 authorizes the recovery of attorney's fees as a cost of litigation.

7 And I do want to emphasize that actually further along
8 inside *Sandy Valley*. This is reemphasized. This is not a recovery
9 pursuant to special damages. That this is specifically, the basis
10 here, is a -- or an award of fees recovered pursuant to NRCP 65. All
11 right.

12 So the other thing I want to emphasize is that the
13 Supreme Court also has recognized that other statutes, they discuss
14 damages and costs, include attorney's fees. And that would be --
15 *Waddell* -- it was a case discussing NRS 17.130, subsection 1, and
16 found that that subsection allowed -- also included attorney's fees
17 as far as what interest accrued post judgment even though
18 attorney's fees were not referenced -- attorney's fees were not used
19 in the subsection.

20 And something -- going specifically to NRS 35.270,
21 *Gulbranson* is a case that refers to, again, NRS 34.270, basically
22 what can be recovered afterwards even though the Supreme Court
23 didn't directly address the issue of attorney's fees, it's clear if you
24 look at the [indiscernible] there, that the prevailing party did
25 recover attorney's fees in that matter under 34.270.

1 Now -- and then finally, I do want to emphasize, there are
2 other states -- even though our state has not directly addressed
3 whether or not attorney's fees are recoverable under NRS 34.270, at
4 least two other states nearby have, Montana and Utah. The
5 language under their own statutes are either identical or near
6 identical to the language in NRS 34.270, and in both the
7 circumstances, they recognize, spot on, that attorney's fees were
8 recoverable under those statutes.

9 So -- and the other thing I would just -- on the flip side of
10 this is that the Board has not offered any legal authority or any
11 examples, but the Nevada Supreme Court has found that a statute
12 that allowed for the recovery for damages and costs did not also
13 include attorney's fees when it came down to -- when we were
14 looking at the recovery pursuant to a statute, a rule, or an
15 agreement.

16 However, if the Court does not find that we can recover
17 under 34.270, we still hope that we can recover as special damages.
18 Again, this issue only comes up if we're not able to recover under
19 34.270.

20 So as far as what's going on here, we did ask for
21 attorney's fees in our initial petition and pleading. We've obviously
22 offered evidence to the Court through the submitted affidavits that
23 the fees were accrued as this was going along -- as this litigation
24 was going along.

25 And then finally, as far as litigation be necessary, the

1 Board offered an example in its opposition of bad faith. It came
2 from a case that's does not actually involve attorney's fees. What
3 we're looking at here, the real question of course is, was litigation
4 necessary based upon the actions of the other party? And as we
5 look at it here, the Board -- it seems like one of the major
6 arguments the Board's making is that we could have petitioned
7 them at a time that's in argument that they made previously to get
8 cannabis removed from those Schedule 1 substances. However,
9 the way that the Board has handled the litigation in this matter
10 suggest that would have been -- that argument is not supported by
11 the actions that are going on here.

12 Again, the Board has a right to litigate its case as it sees
13 fit. But the Board's approach to litigation have resulted in multiple
14 delays as this has been going along. It is now, of course,
15 appealing, which it has the right to do. But again, to suggest that
16 us petitioning them would have gotten the same result, appears to
17 be undermined by their own arguments that they're making here.

18 I'd also simply point out that the Board has made a series
19 of procedural arguments. They did not have substantive impact on
20 this case. This is starting with the fact that we came to the first
21 hearing, and if I recall correctly, they were moving for dismissal
22 because the AG hadn't been served, when in fact, the AG was never
23 going to be representing the Board on this matter.

24 When we look at their motion to dismiss, which contains
25 all the same arguments they made in their answer -- and so in turn,

1 we've had what could have been, perhaps one hearing, turns into
2 three as this goes along. They have the right to do that, but as far
3 as the argument that they then turn around and argue that litigation
4 was not the only option here is belied by, I think, the record that's
5 been produced in this case.

6 So, Your Honor, if we are not entitled to, obviously, under
7 NRS 34.270, we believe we're entitled to them as special damages.

8 THE COURT: Thank you very much.

9 MR. KANDT: Thank you, Your Honor.

10 So once again, you've got the issue of whether they're
11 recoverable as a cost of litigation pursuant to statute or rule versus
12 whether they're recoverable as special damages. And Counsel
13 makes the point that the State has failed to produce case law
14 directly on point in which the Nevada Supreme Court has ruled that
15 a party cannot recover attorney's fees under NRS 34.270. But
16 Counsel also acknowledges that the Nevada Supreme Court has
17 never addressed the issue directly and then relies upon some other
18 case law and asks the Court to infer or apply that case law in this
19 different context.

20 And just to point out quickly how some of those cases can
21 be distinguished. *Waddell* is distinguishable because the attorney's
22 fees weren't originally awarded pursuant to NRS 17.130, subsection
23 1. That's the post judgment interest statute. But the attorney's fees
24 were originally awarded pursuant to -- on some other basis. It's not
25 identified in the opinion. But they were awarded on some other

1 basis.

2 *Sandy Valley*, yes, in a series of footnotes in that case, the
3 Court attempts to clarify what happened in some proceeding cases.
4 It didn't get into the merits of whether the award of attorney's fees
5 in those cases was appropriate or not. It simply said, in this case,
6 the Court cited a statute, and it shouldn't have called them
7 damages, it should have called them cost of litigations.

8 In this case, the Court didn't base its award on a statute or
9 a rule. It based it on special damages as pled and adjudicated in
10 the case. So the fact that they, kind of, tried to delineate what's a
11 statute or rule, and that that should be identified as a cost of
12 litigation versus a party pleading special damages and that the
13 ruling should have identified it as damages. But once again, NRS
14 34.270 was not applicable in any of those cases.

15 And I think *Gulbranson*, which is perhaps the only case
16 that even comes close to illuminating the issue and still falls short,
17 is distinguishable because --

18 THE COURT: So let me -- is it *Gulbranson* that you're
19 referring to? Or is there a different -- what case --

20 MR. KANDT: I'm sorry, Your Honor. Did you have a
21 question for me there?

22 THE COURT: Yeah. Sorry. And that's my bad. Sorry.

23 You referenced a case name just now, and I didn't quite
24 catch the name. Was it the *Gulbranson* case or was it a different --

25 MR. KANDT: Yeah, *Gulbranson* --

1 THE COURT: Okay.

2 MR. KANDT: -- is the case I was just going to address.

3 THE COURT: Okay. Yeah, yeah, yeah.

4 MR. KANDT: Because it's the only one that mentions NRS
5 Chapter 34. But I think it's important to note -- and, I mean, this is
6 repeated in not only the opinion but in the decent, is that the sole
7 issue on appeal in that case was the denial of damages.

8 So the fact that the Court mentions that there had been
9 attorney's fees awarded in that case -- and I don't know what basis
10 they were awarded. It's not identified in the case. But the award of
11 attorney's fees wasn't an issue in that case. It's very clear in the
12 opinion that the sole issue on appeal was the denial of damages.
13 So I still don't think that that is definitive on the issue here.

14 THE COURT: Yeah. And I think -- I mean, I think you're
15 right. But tell me about -- you know, sometimes this happens still
16 today in Nevada where we don't have cases on point. They then
17 turn those other two cases out of Utah and -- I forget the other state
18 right now, but tell me about them.

19 MR. KANDT: Okay. But with regard to special damages,
20 they weren't specifically pled, and that's very clear in the case law
21 that when you intend to seek attorney's fees as damages arriving
22 from -- or arising from bad faith conduct, you have to plead them as
23 such under NRCP 9(g). And there's a whole series of factors that go
24 into play there. Are they shown to be reasonably foreseeable?
25 Proved by competence -- competent evidence just as any other

1 element damages, and natural and approximate consequence of
2 the injurious conduct.

3 And so, when we look at it here, once case that was cited,
4 I want to mention, was *Pardee Homes*. And I think it's important to
5 note in *Pardee Homes*, that the plaintiff's amended their complaint
6 to plead attorney's fees as special damages. That wasn't the case
7 here. We're left with the original petition that was presented to the
8 Court.

9 But moving on to those elements, none of which were
10 provided here. I think really, the issue is do you have bad faith
11 conduct, and did you force the petitioners to have no choice but to
12 litigate? And I don't think any of those -- either of those standards
13 are met.

14 I do believe the Board has throughout this proceeded on a
15 good faith belief that the continued listing of marijuana in Schedule
16 1, which was placed there by the Nevada Legislature, not by the
17 Board, was lawful. Both under the standards of NRS Chapter 453
18 and also based in part upon the continued designation of marijuana
19 as a Schedule 1 controlled substance in federal law because
20 Chapter 453 ties the Board's determinations to what's done at the
21 federal level. And they believed it was consistent with legislative
22 intent and the will of the voters.

23 And then in terms of whether the petitioners have no
24 choice but to litigate, once again, they had an alternative. They
25 chose not to exercise it. And I understand that the Court ruled that

1 they weren't required to exhaust their administrative remedies in
2 this instance. But that doesn't mean they couldn't have chosen to
3 petition the Board anytime over the last 20 years to review the
4 continued scheduling of marijuana, and they just chose not to do
5 so. Instead, they chose to pursue litigation; that was their choice.
6 So the notion that they had not choice but to litigate, they had
7 another choice, and we don't know what the Board would have
8 done. We just simply don't know because they didn't exercise that
9 option.

10 And, you know, I believe they're asserting that the mere
11 fact that the Board has defended this action, somehow justifies an
12 award. But once, you know, I think the Board had a responsibility
13 to defend this action and to present the laws that mandate the
14 Board's conduct and actions for the Court's consideration.

15 You know, the issue of raising the issue of service of the
16 original petition upon the State in conformance with state law --

17 THE COURT: No, I don't really care about that.

18 MR. KANDT: Yeah, yeah, yeah. To me, that's -- I spent 25
19 years at the Attorney General's Office and the law is very clear.
20 When you sue the State, you serve the AG, whether the Attorney
21 General's Office actually defends the action or not. So I'll just leave
22 it at that.

23 And, once again, just simply submit that in this instance,
24 there's not a basis to award attorney's fees as either costs or
25 special damages.

1 THE COURT: Thank you very much.

2 Bear with me a second.

3 [Pause in proceedings]

4 THE COURT: Okay.

5 MR. PETERSON: All right. Your Honor, I just want to
6 come back to something because I think that this was not
7 addressed on what the Board just said. And this is the key question
8 here, right, when it comes down to what statutes, rules, and
9 agreements authorize the disbursement of attorney's fees. All
10 right.

11 And probably more precisely, can a statute that generally
12 allows or orders the recovery of damages and costs include
13 attorney's fees? That's the question really before this Court; right?

14 And in turn, what we have, and the reason why we point
15 to these various cases; right? This specific example is offered by
16 the Nevada Supreme Court is over, and over, again, the Nevada
17 Supreme Court indicates that when a statute authorizes that the
18 recovery of damages and costs, you don't need the magic words,
19 attorney's fees, in there for attorney's fees to be disbursed.

20 NRCP 65 is an excellent example of this. Again, *Artistic*
21 *Hairdresser*, as much as the previous court may have suggested
22 damages, when we look at *Sandy Valley*, the Supreme Court said,
23 let's clarify this; right? This is not about special damages. This is
24 about NRCP 65, and that alone, justifies the disbursement of
25 attorney's fees. And in there, in NRCP subsection C, the words,

1 attorney's fees, do not appear in there, it's damages and costs.

2 And then we look at *Jim [sic] Hardie Gypsum*, again, the
3 contractual provision we're looking at there; right? It lists a range
4 of things that are going to be recovered in the agreement, but the
5 magic words, attorney's fees, don't appear in there, but damages
6 and costs do. And that, again, the Court recognizes is that they
7 don't ask for the recovery of attorney's fees.

8 And then when we talk about *Waddell*; right? If *Waddell*
9 was not -- losing party in that was not arguing that attorney fees
10 don't qualify as damages and costs, there would have been nothing
11 to talk about in *Waddell*; right? Their argument was that 17.130,
12 subsection 1- didn't include attorney fees because it didn't use the
13 magic word, attorney fees. That must have been their argument,
14 and that argument lost in *Waddell*.

15 So what we're looking at here is that, if the -- says
16 damages and costs, that is a statute, a rule, or an agreement that
17 authorizes the disbursement of attorney's fees, and that lines up
18 with our neighbors. It lines up with Utah. It lines up with Montana.

19 And so, what we're looking at here is we have a statute on
20 point. NRS 34.270 that entitles us to recovery of damages and
21 costs, the same words that we see over and over again elsewhere.
22 Over and over again, recognized by the Nevada Supreme Court as
23 justifying recovery of attorney's fees. And under NRS 34.270, we're
24 entitled to recover them.

25 Thank you, Your Honor.

1 THE COURT: Thank you. Thank you both very much.
2 So I don't know if it's appropriate to call this one a first
3 impression issue while -- but perhaps, so I don't reach the
4 alternative argument of -- sorry, I'm a little -- my notes are a little --
5 on different pages up here.

6 Special damages -- I base my decision here on NRS
7 34.270 and agree with Petitioner's -- first off, that this is a pure legal
8 issue under that statute. Whether the word, damages, in that
9 statute includes attorney's fees, that's the legal issue in front of the
10 Court. Respondent/Defendant's do not take any issue with the
11 application of *Brunzell* factors. So the issue is really a legal issue
12 about whether attorney's fees is included in that word damages.

13 It appears to the Court reviewing the Nevada Supreme
14 Court cases that the Court acknowledges are not on point.
15 Somewhat, kind of, analyzing some related issues or analogous
16 issues, so I take those, and I take the persuasive authorities and the
17 Utah case and the Montana case, I find that under a statute, it
18 certainly appears, although I will acknowledge attorney's fees is not
19 in that statute -- another issue for the legislature, another day, I
20 guess -- but it appears based on, you know, analogous cases in
21 Nevada, related cases in Nevada, and then cases that are in
22 neighboring states that dealt with the same issues, attorney's fees
23 are included in that word, damages.

24 The Court incorporates all the reasons as set forth in
25 detail in the motion and the reply, so put those in there. Except, I'm

1 basing -- I'm not getting to the alternative argument just the 34.270.
2 I do not -- and to be clear, I don't find even in the alternative, I don't,
3 you know, how to put this? Because I do want you to put this in the
4 order.

5 I, obviously, ruled against the Board of Pharmacy, both on
6 the substance and on the stay on this issue, but I don't believe that
7 the Board of Pharmacy did anything, you know, that would merit
8 fees as a sanctions, so that, you know, there's nothing intentional
9 or nefarious or anything even remotely close to that, that the Board
10 has done, whether prior to this litigation or in this litigation. It's
11 just, you know, good faith positions that the Board has taken. I,
12 obviously, disagree with them, but, you know, nothing that would
13 merit, you know, finding any intentional conduct or anything
14 remotely close to that. So put that in the order, too.

15 Prepare that order, submit it to Mr. Kandt for review and
16 approval.

17 MR. PETERSON: Your Honor, do you have a timeline for
18 the two orders?

19 THE COURT: If you all want to agree on something other
20 than two weeks, that's totally fine by me.

21 I think if you need more time, or the State needs more
22 time --

23 MR. PETERSON: Your Honor, two weeks works for us.
24 We've had good contact with the Board, so we can -- if we need
25 more time, we can talk about it.

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THE COURT: Anything on -- you okay with that?

MR. KANDT: Mm-hmm. Yes, Your Honor.

THE COURT: Okay. Thank you all.

[Proceeding concluded at 10:59 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Brittany Amoroso
Independent Transcriber

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W

Department: 15

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

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

1 **FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THEREFORE, IT IS HEREBY ORDERED:

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

Dated this 8th day of February, 2023



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

218 E08 4581 3149

Joe Hardy

~~District Court Judge~~

HONORABLE JUDGE JOE HARDY JR.

Respectfully submitted by:

Approved as to form and content by:

**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

NEVADA BOARD OF PHARMACY

/s/ Sadmira Ramic

/s/ Peter K. Keegan

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

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

CASE NO: A-22-851232-W

8 vs.

DEPT. NO. Department 15

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

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

16 Service Date: 2/8/2023

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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 GRANTING
PETITIONERS' MOTION FOR
ATTORNEY FEES AND COSTS**

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

1 **FINDING OF FACT**

2 On April 15, 2022, Petitioners filed their petition for writ of mandamus, in which
3 Petitioners requested that the Court prevent the Nevada Board of Pharmacy from (1) scheduling
4 cannabis as a Schedule I substance in violation of the Nevada Constitution and (2) cease regulating
5 cannabis as, following the passage of NRS Title 56, cannabis now falls outside the Board’s
6 authority. Petitioners also requested an award of reasonable attorney fees and costs incurred in this
7 action. As required under Nevada law, Petitioners served the petition on the Board of Pharmacy
8 and the Attorney General for the State of Nevada.

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

13 Regarding attorney fees and costs, during the course of this litigation, counsel for
14 Petitioner:

- 15 • Researched, drafted, and filed Petitioner’s petition for writ of mandamus and replied to the
16 Respondent’s answer;
- 17 • Researched, drafted, and filed Petitioner’s Opposition to Respondent’s Motion to Dismiss;
- 18 • Researched, drafted, and submitted proposed orders based on the Court’s rulings on the
19 Respondent’s Motion to Dismiss and Petitioner’s petition while engaging in necessary
20 correspondence with opposing counsel; and
- 21 • Attended three separate court hearings related to the petition.

22 The value of these services as of November 16, 2022, was \$47,463.18. Petitioners had spent
23 \$684.20 in other costs as of that date.

24 On November 16, 2022, Petitioners filed a Motion for Attorney Fees and Costs requesting
25 \$47,463.18 in attorney fees and \$684.20 in other costs. Petitioners filed the necessary affidavits
26 and documentation to support their request. On November 23, 2022, Respondent/Defendant
27 Nevada Board of Pharmacy (hereafter “the Board”) filed its opposition to Petitioners Motion for

1 Attorney Fees and Costs. On December 31, 2022, Petitioners filed a reply to the opposition. A
2 hearing on the matter was held on January 9, 2023.

3 As necessary, this order incorporates by reference the factual findings of the Judgment and
4 Order Granting Petition for Writ of Mandamus and Request for Declaratory Relief issued by the
5 Court on October 26, 2022.

6 **CONCLUSIONS OF LAW REGARDING IMMEDIATE RULING**

7 Pursuant to their Motion for Attorney Fees and Costs, Petitioners requested that this Court
8 award \$47,463.18 in attorney fees and \$684.20 in other costs. The Board objected to Petitioners’
9 request for attorney fees, arguing that Petitioners were not entitled to attorney fees as either a “cost
10 of litigation” or as special damages. The Board did not dispute ((1) the factual basis for Petitioners’
11 request for attorney fees or other costs, or (2) Petitioners’ application of the factors described in
12 *Brunzell v. Golden Gate Nat’l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

13 **I. NRS 34.270 authorizes the recovery of attorney fees.**

14 Under Nevada law, “[a]ttorney fees may be awarded as either (1) fees as a cost of litigation
15 or (2) fees as an element of damages.” *Mitchell v. Nype*, No. 80693, 2022 Nev. Unpub. LEXIS 694
16 *7 (Sept. 23, 2022)(unpublished)(citing *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*,
17 117 Nev. 948, 955, 35 P.3d 964, 968–69 (2001)). A party can recover attorney fees as a litigation
18 cost if recovery is “authorized by statute, rule, or agreement”. *Pardee Homes v. Wolfram*, 135 Nev.
19 Adv. Rep. 22, 444 P.3d 423, 426 (2019). Petitioners argue that (1) NRS 34.270 applies to this
20 matter and authorizes the recovery of attorney fees or, in the alternative, (2) they may recover
21 attorney fees as special damages. As this Court finds it has the authority to award attorney fees
22 pursuant to NRS 34.270, it does not reach the issue of special damages.

23 NRS 34.270 states that when a judgment is issued in favor of a petitioner that has applied
24 for a petition for writ of mandamus, the “applicant” is entitled to “recover the damages which the
25 applicant shall have sustained as found by the jury, or as determined by the court or master, upon
26 a reference to be ordered, together with costs.” NRS 34.270 does not explicitly use the term
27 “attorney fees,” and the Nevada Supreme Court has never directly determined whether NRS

1 34.270 includes the recovery of attorney fees. While the dicta of *Gulbranson v. Sparks*, 89 Nev 93
2 (1973), suggests that the district court in that matter may have granted an award of attorney fees
3 pursuant to NRS 34.270, the issue as to whether that award was proper did not come before the
4 Court.

5 Nevada has, however, recognized that analogous Nevada statutes, rules, and agreements
6 authorizing the recovery of damages and costs without explicitly using the term “attorney fees”
7 also authorize the recovery of attorney fees. and neighboring states with provisions either identical
8 to NRS 34.270 or practically identical recognize the recovery of attorney fees under those statutes.
9 Nevada recognizes that NRCP 65(c)¹ and NRS 17.130(1)² both allow for the recovery related to
10 attorney fees without explicitly including the term “attorney fees” in their provisions. *Sandy Valley*
11 *Assocs. v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 968–69 n.6 (2001) (“The following
12 cases involved the award of attorney fees as a cost of litigation pursuant to a rule, statute or
13 agreement” and “[a]ny language suggesting the fees were awarded as damages is hereby
14 disapproved.”) (citing *Artistic Hairdressers, Inc. v. Levy*, 87 Nev. 313, 486 P.2d 482 (1971)
15 (granting attorney fees pursuant to NRCP 65(c)); *Waddle v. L.V.R.V.*, 122 Nev. 15, 26 – 27 (2006)
16 (determining that term “any debt, damages or costs” as used in NRS 17.130(1) included attorney
17 fees in the context of the award of post-judgment interest awards even though the term “attorney
18 fees” did not appear in that statute). In the context of agreements, Nevada granted attorney fees as
19 a cost of litigation based upon contractual provisions that only guaranteed reimbursement for
20 “damage to and loss of equipment for any cause” and “loss, damage, liability, cost of expense, of
21

22 ¹ “Security. The court may issue a preliminary injunction or a temporary restraining order only if
23 the movant gives security in an amount that the court considers proper to pay the costs and damages
24 sustained by any party found to have been wrongfully enjoined or restrained. The State, its officers,
and its agencies are not required to give security.” NRCP 65(c).

25 ² “In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs,
26 and in all executions issued thereon, the amount must be computed, as near as may be, in dollars
27 and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be considered
erroneous for that omission.” NRS 17.130(1).

1 whatsoever nature or cause, arising out of [defendant]’s use or possession of equipment.” See
2 *James Hardie Gypsum, Inc. v. Inquipco*, 112 Nev. 1397, 1405–07 (1996) (cited by *Sandy Valley*
3 *Assocs.*, 117 Nev. at 968–69 n.6). Finally, states neighboring Nevada, in reviewing statutes
4 identical to NRS 34.270, have found that such provisions include the recovery of attorney fees
5 despite not explicitly using the language “attorney fees”. See *Kadillak v. Anaconda Co.*, 184 Mont.
6 127, 144, 602 P.2d 147, 157 (1979) (holding that Mont. Code. Ann. § 27-26-4023 allowed for the
7 recovery of attorney fees); *Colorado Dev. Co. v. Creer*, 96 Utah 1, 17–18 (1938) (determining that
8 Utah Code Ann. § 78B-6-6094 included the recovery of attorney fees if supported by sufficient
9 evidence). By comparison, the Board fails to offer any instances where a Nevada statutory
10 provisions analogous to NRS 34.270 did not authorize the recovery of attorney fees or explain why
11 NRS 34.270 should be treated differently than its counterparts in Montana or Utah.

12 Considering that statutes, rules, and agreements with language analogous to NRS 34.270
13 as well as statutes practically identical to NRS 34.270 from neighboring statutes have authorized
14 the recovery of attorney fees, this Court finds that Petitioners may recover attorney fees pursuant
15 to NRS 34.270 as a cost of litigation.

16 The Court finds that NRS 34.270 authorizes this Court to grant an award of attorney fees.
17 The Court grants the Petitioners’ request of \$47,463.18. As the Court grants the Petitioners’ request
18 for attorney fees pursuant to NRS 34.270, it is unnecessary for this Court to determine whether
19 Petitioners are entitled to attorney fees as special damages. However, this Court does find that the
20 positions taken by the Board prior to and during the course of litigation in this matter were made
21 in good faith.

22 **II. Application of the *Brunzell* factors to Petitioners’ request for attorney fees**

23 While the Board did not dispute the Petitioners’ application of *Brunzell* to this matter, this
24 Court is required to apply the factors prescribed by *Brunzell* in determining an award of attorney
25 fees. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82 (2014) (finding that the district court abused
26 its discretion when it failed to apply the *Brunzell* factors in ordering an award of attorney fees). In
27 evaluating an award of attorney fees, this Court must consider “(1) *the qualities of the advocate:*

1 his ability, his training, education, experience, professional standing and skill; (2) *the character of*
2 *the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the
3 responsibility imposed and the prominence and character of the parties where they affect the
4 importance of the litigation; (3) *the work actually performed by the lawyer*: the skill, time and
5 attention given to the work; (4) *the result*: whether the attorney was successful and what benefits
6 were derived.” *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

7 Petitioners are requesting the following fee rates for the attorneys that worked on this
8 matter:

- 9 • \$388 per hour prior to October 1, 2022, and \$400 per hour after October 1, 2022, for
10 Christopher Peterson;
- 11 • \$388 per hour for Sophia Romero;
- 12 • \$369 per hour for Sadmira Ramic.

13 Applying the *Brunzell* factors, these rates first reflect the qualities of the advocates involved in this
14 case. As attorneys for the ACLU of Nevada, all three attorneys specialize in constitutional law
15 issues. The difference in fee rates reflects each attorneys’ experience as an attorney in general and
16 their specific talents, which were reflected in affidavits attached to Petitioners’ Motion for
17 Attorney Fees and Costs. Second, the work here was particularly challenging in that it required an
18 understanding of constitutional law related to cannabis, the limits of agency delegation, and the
19 interplay between criminal law and executive agency rule-making authority. The issues in this
20 matter were also important in that they had a state-wide impact, the regulation of an emerging
21 market here in Nevada, and long-standing legal inconsistencies. Third, the attorneys have billed
22 for services actually performed and necessary to this matter, primarily for researching, drafting,
23 and arguing filings that ultimately determined the outcome of this matter, as reflected in the records
24 offered to this Court in exhibits attached to Petitioners’ Motion for Attorney Fees and Costs.
25 Finally, the Petitioners were successful in achieving all objectives stated in their original petition
26 for writ of mandamus.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Attorney fees are recoverable pursuant to NRS 34.270 as a cost of litigation.
2. Petitioners are entitled to their attorney fees as a cost of litigation pursuant to NRS 34.270 as they applied for a writ of mandamus, and this Court granted judgment in their favor.
3. As it is undisputed by the parties, Petitioners are entitled to recover their requested costs other than attorney fees pursuant the NRS 34.270.
4. As Petitioner’s application of the *Brunzell* factors is undisputed by the parties, Petitioners shall be awarded their attorney fees incurred prior to November 16, 2022, in the amount of \$47,463.18.
5. Petitioners shall be awarded their other costs incurred prior to November 16, 2022, in the amount of \$684.20.
6. Pursuant to the foregoing, in total, the Petitioners are hereby awarded \$48,147.38 in reasonable attorney fees and other costs.

Dated this 8th day of February, 2023

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



HONORABLE JUDGE JOE HARDY JR.

Respectfully submitted by:
**AMERICAN CIVIL LIBERTIES
UNION OF NEVADA**

Approved as to form and content by:
Joe Hardy
District Court Judge
NEVADA BOARD OF PHARMACY

/s/ Christopher Peterson
SADMIRA RAMIC, ESQ.
Nevada Bar No. 15984
CHRISTOPHER M. PETERSON, ESQ.
Nevada Bar No. 13932
SOPHIA A. ROMERO, ESQ.
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/s/ Peter K. Keegan
BRETT KANDT, ESQ.
Nevada Bar No. 5384
General Counsel
PETER K. KEEGAN
Nevada Bar No. 12237
Assistant General Counsel
Attorneys for Respondent/Defendant

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-22-851232-W

7 vs.

DEPT. NO. Department 15

8
9 Nevada ex reL. Board of
Pharmacy, Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Granting Motion 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: 2/8/2023

16 Luke Rath

lrath@ag.nv.gov

17 Emily Bordelove

ebordelove@ag.nv.gov

18 Peter Keegan

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19 William Kandt

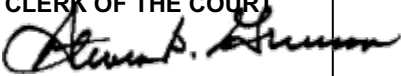
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20 Sadmira Ramic

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13 Reno, NV 89521
14 TEL: (775) 850-1440
15 *Attorneys for Respondent/Defendant*

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

13 CANNABIS EQUITY AND INCLUSION
14 COMMUNITY (CEIC), a domestic
15 nonprofit corporation; ANTOINE POOLE,
16 an individual,
17
18 Petitioners/Plaintiffs,
19
20 vs.
21
22 STATE OF NEVADA ex rel. BOARD OF
23 PHARMACY, a public entity of the State
24 of Nevada
25
26 Respondent/Defendant.

Case No. A-22-851232-W
Dept. No. 15

21 **NOTICE OF APPEAL**

22 NOTICE IS HEREBY GIVEN that THE STATE OF NEVADA ex rel. its BOARD
23 OF PHARMACY, hereby appeals pursuant to NRAP 3 to the Nevada Supreme Court from
24 the Order Granting Petitioners’ Motion for Attorney Fees and Costs entered on February
25 8, 2023.

1 Respectfully submitted this 15th day of February 2023.

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

4 By: /s/ Brett Kandt
5 Brett Kandt (Bar No. 5384)
6 General Counsel
7 Peter K. Keegan (Bar. No. 12237)
8 General Counsel
9 Gregory Zunino (Bar No. 4805)
10 General Counsel
11 *Attorneys for Respondent/Defendant*

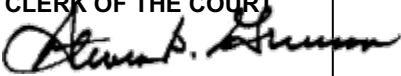
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada State Board of Pharmacy, and that on this 15th day of February 2023, I served a true and correct copy of the foregoing document by electronic service through the Court’s electronic filing system to the following:

Sadmira Ramic, Esq.
Christopher M. Peterson, Esq.
Sophia Romero, Esq.
American Civil Liberties Union of Nevada
601 South Rancho Drive, Suite B-11
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Email: ramic@aclunv.org
peterston@aclunv.org
romero@aclunv.org
Attorneys for Petitioners/Plaintiffs

/s/ Brett Kandt
BRETT KANDT
General Counsel
Nevada State Board of Pharmacy



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12 985 Damonte Ranch Parkway – Suite 206
13 Reno, NV 89521
14 TEL: (775) 850-1440
15 *Attorneys for Respondent/Defendant*

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

13 CANNABIS EQUITY AND INCLUSION
14 COMMUNITY (CEIC), a domestic
15 nonprofit corporation; ANTOINE POOLE,
16 an individual,
17
18 Petitioners/Plaintiffs,
19
20 vs.
21
22 STATE OF NEVADA ex rel. BOARD OF
23 PHARMACY, a public entity of the State
24 of Nevada
25
26 Respondent/Defendant.

Case No. A-22-851232-W
Dept. No. 15

21 **CASE APPEAL STATEMENT**

22 Pursuant to NRAP 3(f), the State of Nevada ex rel. Board of Pharmacy (“Board”), hereby
23 submits the following case appeal statement:

24 A. District court case number and caption, showing names of all parties to the
25 proceedings (without using et al.): The full case numbers and captions, showing names of
26 all parties, are as follows: Case Number A-22-851232-W; Cannabis Equity and Inclusion
27 Community (CEIC); a domestic nonprofit corporation; Antoine Poole, an individual v. State
28 of Nevada ex rel. Board of Pharmacy, a public entity of the State of Nevada.

1 B. Name of judge who entered the order or judgment being appealed:

2 The Honorable Joe Hardy, District Court Judge, Eighth Judicial District Court.

3 C. Name of each appellant, and name and address of counsel for each appellant:

4 State of Nevada ex rel. Board of Pharmacy through its counsel:

5 Brett Kandt
6 General Counsel
7 Peter Keegan
8 General Counsel
9 Gregory Zunino
10 General Counsel
11 985 Damonte Ranch Pkwy #206
12 Reno, NV 89521

13 D. Name of each respondent, and name and address of each respondent's
14 appellate counsel, if known: Cannabis Equity and Inclusion Community (CEIC); Antoine
15 Poole, through their counsel:

16 Sadmira Ramic, Esq.
17 Christopher M. Peterson, Esq.
18 Sophia Romero, Esq.
19 American Civil Liberties Union of Nevada
20 601 South Rancho Drive, Suite B-11
21 Las Vegas, NV 89106

22 E. Whether attorneys identified in subparagraph D are not licensed to practice
23 law in Nevada; and, if so, whether the district court granted permission to appear under
24 SCR 42 (include copy of district court order granting permission): The attorneys in
25 subparagraph D are licensed in Nevada.

26 F. Whether appellant was represented by appointed counsel in the district court
27 or on appeal: Appellant was represented by retained counsel in the district court and will
28 be represented by retained counsel on appeal.

29 G. Whether any appellant was granted leave to proceed *in forma pauperis*: No.

30 H. Date proceedings were commenced in district court: April 15, 2022.

31 I. Brief description of nature of the action and result in district court, including
32 type of judgment or order being appealed and relief granted by district court: Order

1 Granting Petitioners' Motion for Attorney Fees and Costs entered on February 8, 2023.

2 J. Whether the case was previously the subject of appeal or writ proceeding in
3 Nevada Supreme Court and, if so, caption and docket number of prior proceeding: Yes:
4 STATE OF NEVADA ex rel. BOARD OF PHARMACY, a public entity of the State of
5 Nevada, Appellant, vs. CANNABIS EQUITY AND INCLUSION COMMUNITY (CEIC), a
6 domestic nonprofit corporation; ANTOINE POOLE, an individual, Respondents, Supreme
7 Ct. Case No. 85756.

8 K. Whether the appeal involves child custody or visitation: No.

9 L. Whether the appeal involves the possibility of settlement: Settlement not
10 possible.

11 Respectfully submitted this 15th day of February 2023.

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

14 By: /s/ Brett Kandt
15 Brett Kandt (Bar No. 5384)
16 General Counsel
17 Peter K. Keegan (Bar. No. 12237)
18 General Counsel
19 Gregory Zunino (Bar No. 4805)
20 General Counsel
21 *Attorneys for Respondent/Defendant*
22
23
24
25
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1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of the Nevada State Board of Pharmacy, and that on
3 this 15th day of February 2023, I served a true and correct copy of the foregoing document
4 by electronic service through the Court’s electronic filing system to the following:

5 Sadmira Ramic, Esq.
6 Christopher M. Peterson, Esq.
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10 Las Vegas, NV 89106
11 Email: ramic@aclunv.org
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romero@aclunv.org
Attorneys for Petitioners/Plaintiffs

12
13 /s/ Brett Kandt
14 BRETT KANDT
15 General Counsel
16 Nevada State Board of Pharmacy
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