IN THE SUPREME COURT OF THE STATE OF NEVADA

Consolidated Case Nos. 85756 and 86128

Electronically Filed
Jun 23 2023 10:53 AM
Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA BOARD OF PHARMACY,
a public entity of the State of Nevada,

Appellant,

v.

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

Respondents.

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Appellant is the State of Nevada Board of Pharmacy ("Board"). Respondents are the Cannabis Equity and Inclusion Community ("CEIC"), a nonprofit organization, and Antoine Poole ("Poole"), an individual. By administrative regulation, the Board has listed marijuana, cannabis, and cannabis derivatives (hereinafter "marijuana") as schedule I controlled substances, thus maintaining consistency with federal law as required by Nevada statutory law. *See* NAC 453.510(4), (9) and (10); *cf.* 21 C.F.R. § 1308.11(d)(31); *see also* NRS 453.146; NRS 435.166; NRS 453.2182; NRS 453.2186; NRS 453.2188.

The principal issue on appeal is whether the Board's regulation conflicts with article 4, § 38 of the Nevada Constitution. This issue was adjudicated by the Honorable Joe Hardy of the Eighth Judicial District Court in and for Clark County, Nevada ("District Court"). Having determined that the schedule I designation conflicts with the Nevada Constitution, the District Court issued an order granting equitable relief to CEIC and Poole. The equitable relief was in the form of a writ of *mandamus* and a judgment for declaratory relief. (JA 133–144). By separate order, the District Court awarded costs and attorney's fees to CEIC and Poole. (JA 346–352). The first order is a final dispositive ruling appealable pursuant to NRAP 3A(b)(1). The post-judgment order awarding costs and attorney's fees is appealable pursuant to NRAP 3A(b)(8). The Board timely filed notices of appeal with respect

to each of the District Court's two orders. (JA 226–227, 354–355). This Court consolidated the two appeals by order dated April 3, 2023. The Court has jurisdiction over the consolidated appeals pursuant to article 6, § 4(1) of the Nevada Constitution.

II. ROUTING STATEMENT

Pursuant to NRAP 17(a)(11), the Nevada Supreme Court retains this appeal because it raises as a principal issue a question of first impression involving the Nevada Constitution, namely whether Nev. Const. art. 4, § 38 divests the Board of its statutory authority to list marijuana as a schedule I controlled substance. Additionally, pursuant to NRAP 17(a)(12), the Nevada Supreme Court may also retain this appeal because it raises a question of statewide public importance, specifically whether NRS 34.270 authorizes the petitioner in a *mandamus* action to recover attorney's fees as an element of "damages" or "costs." This is a question of first impression in Nevada.

III. STATEMENT OF THE ISSUES

Issue No. 1: Insofar as NAC 453.510 lists marijuana as a schedule I controlled substance, the District Court concluded that the regulation violates NRS 453.166 and conflicts with article 4, § 38 of the Nevada Constitution. Did the District Court incorrectly construe these provisions?

Issue No. 2: The District Court issued a writ of *mandamus*, ordering the Board to remove marijuana from its listing of schedule I controlled substances. Did the District Court correctly apply the applicable legal standards for granting writ relief? If so, did the District Court's order fashion a lawful remedy for the Board's alleged manifest abuse of discretion?

Issue No. 3: CEIC and Poole allege that Poole and/or CEIC's members have been injured by the "collateral consequences" associated with their convictions for marijuana-related criminal offenses. What, if anything, has the Board done to cause CEIC, CEIC's members, and/or Poole to suffer from the collateral consequences of a criminal conviction? Assuming CEIC and/or Poole have articulated a connection between the Board and such collateral consequences, does that connection suffice to give them standing to challenge the constitutionality of NAC 453.510?

Issue No. 4: The District Court awarded costs and attorney's fees to CEIC and Poole pursuant to NRS 34.270. Is NRS 34.270 applicable to the facts of this case? If so, does the statutory right to recover "damages" or "costs" encompass a right to recover attorney's fees?

IV. STATEMENT OF THE CASE

The Board licenses and regulates participants in the market for prescription pharmaceutical drugs to the extent "that [those drugs] are *restricted by federal law* to sale by or on the order of a physician to any person located within this State."

NRS 639.233 (emphasis added). In other words, it regulates the possession, manufacture, distribution, and dispensing of prescription drugs. S*ee* NRS 639.013 ("prescription" means an order from a physician to a pharmacist). The Board's authority to regulate controlled substances is a function of its authority to regulate the conduct of its licensees and registrants. Notably, those licensees and registrants work within a vast network of interstate pharmaceutical supply chains designed to deliver prescription drugs to patients. Consequently, the Nevada Legislature has explicitly authorized the Board to schedule controlled substances according to federal standards. *See* NRS 453.146; NRS 453.166; NRS 453.2182; NRS 453.2186; NRS 453.2188. Likewise, it has authorized the Board to discipline its licensees and registrants for violating both federal and state drug laws. *See*, *e.g.*, NRS 453.346(2); NRS 453.151; NRS 453.154; NRS 453.231(1)(g); NRS 639.210(11); NRS 639.2107; NRS 639.221.

CEIC and Poole sued the Board for injuries resulting from the "collateral consequences" associated with law enforcement activity directed at marijuana users. (JA 003:16–26, 006:1–5, 021:10–15, 024:8–9). Since the Board is not a law enforcement agency, there is no discernable connection between the Board's regulatory mission and these alleged collateral consequences. According to Nevada statutory law, the Board cannot license or regulate persons who cultivate, distribute, sell, or consume marijuana because this runs afoul of federal drug laws governing

interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 13 (2005) ("Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.") Simply stated, the Board plays no role in the enforcement of Nevada's recreational or medical marijuana laws. The Board plays no such role because marijuana is not a drug approved by the U.S. Food and Drug Administration ("FDA") that can be prescribed or dispensed by the Board's licensees and registrants. Nevada's medical and recreational marijuana market operates independently of the United States' pharmaceutical supply chains for FDA-approved prescription drugs.

V. STATEMENT OF FACTS

Other than declarations attached to the petition for *mandamus* relief (JA 003–026), the District Court received no evidence, and made only perfunctory findings of fact consisting primarily of legal summaries. (JA 118:6–122:16). In a declaration attached to its petition, CEIC asserts that it "provides support to individuals from underrepresented communities as they apply for licenses to participate in the legal cannabis market." (JA 020:5–6). CEIC further asserts that at least one of its members "has been convicted . . . of a cannabis-related offense after the legalization of medical marijuana in Nevada." (JA 021:9–10). Finally, CEIC asserts that it holds workshops and does other things to help people apply for pardons, seal their criminal records,

and otherwise "deal with consequences resulting from cannabis-related convictions." (JA 021:10–15). CEIC repeats these claims in its petition for *mandamus* relief. (JA 003:16–26).

Poole asserts that he "was adjudicated guilty in the Eighth Judicial District Court of the State of Nevada of Possession of Controlled Substance, a Category E felony pursuant to NRS 453.336, for possession of marijuana on April 20, 2017." (JA 024:5–7). April 20, 2017, is the date of Poole's conviction, not the date of his offense. (JA 004:1–7). Poole states that he has suffered "collateral consequences including hardship in obtaining employment." (JA 024:8–9). Poole repeats this claim in his petition for *mandamus* relief. (JA 006:1–5). Poole does not disclose whether he is a member of CEIC.

Beyond the above assertions, there are no facts of record to explain why CEIC, CEIC's members, or Poole believe they have standing to challenge the constitutionality of NAC 453.510. Poole, for example, does not allege that he applied for a job in the legal cannabis industry, or that he was denied employment because of NAC 453.510. CEIC does not allege that a CEIC member applied for a job in the legal cannabis industry, or that a member was denied employment because of NAC 453.510. Further, CEIC does not explain how its claims against the Board advance its mission of assisting "individuals with prior cannabis-related criminal convictions." (JA 003:3–13). Finally, CEIC does not disclose whether Poole is a

member of CEIC. Despite the Board's motion to dismiss their claims for failure to demonstrate standing (JA 027–033), the District Court did not require CEIC or Poole to develop any facts in support of their claims to standing. (JA 078–079).

VI. SUMMARY OF ARGUMENT

The Board appeals from the Judgment and Order Granting Petition for Writ of *Mandamus* and Request for Declaratory Relief entered by the District Court on October 26, 2022. The District Court ruled in pertinent part that CEIC and Poole had standing to pursue their claims for equitable relief against the Board, and that they were ultimately entitled to a writ of *mandamus* and declaratory relief relating to the Board's listing of marijuana as a schedule I controlled substance in NAC 453.510 (4), (9) and (10).

According to the District Court, the listing directly conflicts with Nev. Const. art. 4, § 38 and violates NRS 453.166. The District Court ordered the Board to "remove" marijuana from NAC 453.510 and "cease the regulation of substances subject to regulation pursuant to Title 56" of NRS. (JA 133:24–25, 134:5–6). These rulings are legally and logically flawed because the Board does not regulate substances; it regulates conduct. To the extent that the Board's regulatory activities impact trade in controlled substances and prescription drugs, the Board has the authority to schedule controlled substances in conformance with NRS chapter 453. The Nevada Legislature has explicitly given the Board this authority. As a matter of

necessity, that authority includes the power to list marijuana as a schedule I controlled substance in adherence to applicable federal standards governing the distribution and sale of marijuana *via* interstate pharmaceutical supply chains. *See* NRS 453.146; NRS 453.166; NRS 453.2182; NRS 453.2186; NRS 453.2188. Contrary to the District Court's conclusion, passage of the *Nevada Medical Marijuana Initiative* did not render those standards inapplicable within the state of Nevada. (*see* JA 128:6–11, 133:9–10; *cf.* NRS 453.166). Further, CEIC and Poole do not have standing to challenge the constitutionality of NAC 453.510 based upon their alleged collateral-consequence injuries. Any such injuries are attributable to criminal convictions, not to the Board's regulatory decisions.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING EQUITABLE RELIEF.

1. THE DISTRICT COURT FAILED TO UNDERSTAND THE NARROW SCOPE OF THE BOARD'S REGULATORY JURISDICTION.

The Board is an executive branch agency that licenses and regulates participants in the market for pharmaceutical care. *See, generally,* NRS chapters 453, 454, and 639. The Board regulates the conduct of drug manufacturers, wholesalers, pharmacies, pharmacists, and other health care practitioners whose activity has the potential to impact the health and safety of Nevadans who use pharmaceutical drugs and medical devices. *See, e.g., Dutchess Bus. Servs. v. Nev. State Bd. of Pharm.*, 124

Nev. 701, 704–708, 191 P.3d 1159, 1162–65 (2008). Like most regulatory boards, agencies, and commissions, the Board imposes professional discipline as a means of correcting the behavior of the persons to whom it issues licenses and registrations. *See, e.g.*, NRS 639.210 : NRS 639.255: NAC 639.945: NAC 639.955. Additionally, the Board may order unlicensed persons to cease and desist from activity that requires licensure or registration by the Board. *See* NRS 638.2895.

The Board does not regulate intrastate trade in marijuana, nor does it supervise cultivation, distribution, and dispensary operations. Further, the Board is not a law enforcement agency. *See* NRS 639.070 (listing the general powers of the Board); NRS 453.146 (listing the powers of the Board with respect to controlled substances). The Board has no authority to take any form of disciplinary action against persons to whom it could not otherwise regulate as a licensee or registrant. *See* NRS 639.255 (The Board may discipline "[t]he holder of any certificate, license or permit issued by the Board."). The Board's overarching responsibility is to protect the public by licensing and regulating all activity within its statutory jurisdiction. *See* NRS 639.213 ("The Legislature hereby declares the practice of pharmacy to be a learned profession, affecting public safety and welfare and charged with the public interest, and is therefore subject to protection and regulation by the State."); NRS 639.0124 (defining the "practice of pharmacy").

CEIC and Poole do not trace their alleged injury to prescription drugs or to the practice of pharmacy. They claim to have been injured by the "collateral consequences" associated with law enforcement activity directed at marijuana users. (JA 0006:3; 0021:13–15; 0024:4–9; 0025:13–16). Although they have sued the Board for maintaining marijuana on its list of schedule I controlled substances, the schedule I listing has no discernable connection to either CEIC or Poole. As it pertains to the Board's statutory responsibilities—responsibilities that do not encompass the activities of which CEIC and Poole complain—the listing dovetails with applicable federal law. *See* NAC 453.510(9); *cf.* 21 C.F.R. § 1308.11(d)(31).

Maintaining consistency with federal law is important because the market for pharmaceutical drugs and medical devices is primarily an interstate market regulated by the FDA, as well as by state regulatory agencies. *See* Scott Bloomberg and Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 2022 Pepp. L. Rev. 839, 843 (2022). By legislative design, marijuana markets are intrastate markets in all states that have legalized trade in marijuana; currently, there is no lawful interstate commerce in marijuana. *Id.* In Nevada, the Cannabis Compliance Board regulates all intrastate trade in marijuana. *See, generally,* NRS chapter 678B. By creating insular, state-based markets for marijuana, Nevada and other states have effectively shielded their state-licensed market participants from FDA scrutiny. *See* Mikos and Bloomberg,

2022 Pepp. L. Rev. at 843. The FDA does not regulate wholly intrastate activity because its authority derives from the Commerce Clause. *See* U.S. Const. art. 1, § 8, cl. 3.

Like the FDA, the Board has many statutory responsibilities, including the responsibility to license and regulate interstate market participants in a manner consistent with federal law. *See, e.g., Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 475 (2013) (holding that New Hampshire drug labeling requirement was preempted by the Supremacy Clause where the requirement conflicted with the federal Food, Drug and Cosmetic Act). Among other things, the Board licenses and regulates persons engaged in the business of distributing "controlled substances, poisons, drugs, devices or appliances that are *restricted by federal law* to sale by or on the order of a physician to any person located within this State." *See* NRS 639.233 (emphasis added). The Board's statutory responsibilities are numerous, and they often overlap with federal law in some significant respect.

For example, the Board is authorized to inspect facilities governed by federal law, *see* NRS 639.090; the Board is authorized to impose discipline for violations of federal law, *see* NRS 639.210; and the Board monitors pharmacists' compliance with federal law, *see* NRS 639.222. *See also* NRS 639.2357 (pharmacists may not transfer prescriptions in violation of federal law); NRS 639.28085 (pharmacists may prescribe, dispense, and administer drugs for preventing the acquisition of human

immunodeficiency virus only to the extent authorized by federal law); NRS 639.540 (Board authorized to enforce federal manufacturing, packaging, shipping, and labeling requirements).

Additionally, pursuant to Nevada statutes, the Board must schedule controlled substances using the same criteria that the U.S. Drug Enforcement Administration ("DEA") applies when it schedules controlled substances under federal law. *See* NRS 453.146 and NRS 453.166-.219; *cf.* 21 U.S.C. § 812. In determining whether to maintain or change a controlled substance designation, the DEA defers to the scientific findings of the FDA. *See* 21 U.S.C. § 811(b).[1] Consistent with federal law, the Board has listed marijuana as a schedule I controlled substance. *See* NAC 453.510; *cf.* 21 C.F.R. § 1308.11(d)(31). In Nevada, NAC 453.510's listing of schedule 1 controlled substances effectively prevents pharmaceutical manufacturers, wholesalers, retailers, and health care professionals from dispensing or distributing drugs in Nevada if those drugs contain substances not approved by the FDA. Otherwise, the listing has no bearing upon lawful intrastate trade in marijuana. *See* NRS 453.005 (stating that NRS chapter 453 is inapplicable where NRS title 56 governs). In Nevada, marijuana is produced, distributed, and sold through wholly

[1] This statute refers to the "Attorney General" (i.e., the DEA) and the "Secretary [of Health and Human Services]" (i.e., the FDA), respectively.

intrastate supply chains that do not fall within the scope of the Board's regulatory jurisdiction. *See, generally*, NRS title 56.

In summary, NAC 453.510 has no relevance to marijuana producers, wholesalers, retailers, or consumers engaged in activities pursuant to NRS title 56. Marijuana can remain in schedule I since schedule I substances are not in the pharmaceutical supply chain and are not dispensed or distributed by pharmacies or health care practitioners. The regulation complements the FDA's regulation of prescription drugs. In this regard, it serves an important purpose because Nevada statutory law explicitly incorporates federal standards applicable to manufacturers, wholesalers, and retailers of prescription drugs. *See, e.g.,* NRS 453.2182 (Board must adopt certain federal regulations as its own); NRS 453.2186 (when evaluating public safety concerns, the Board must consider manufacturer's history of compliance with federal law); NRS 453.2188 (Board may summarily schedule a controlled substance based upon federal treaties, conventions, or protocols). The District Court erred when it determined that NAC 453.510 conflicts with article 4, § 38 of the Nevada Constitution. The regulation and the constitutional provision operate in separate regulatory spheres. At a high level of generality, they set forth competing statements about the medical benefits of marijuana. However, they do not give rise to a clash between different regulatory agencies. If there is disagreement among regulators as to the medical benefits of marijuana, that disagreement has no

legal consequences for CEIC, CEIC's members, or Poole. Because the District Court's decision was based upon an incomplete understanding of the Board's regulatory jurisdiction, its decision should be reversed.

2. THE DISTRICT COURT REFUSED TO ACKNOWLEDGE THE RELEVANT INTERPLAY BETWEEN STATE AND FEDERAL LAW.

As discussed above, Nevada pharmacy law is heavily intertwined with federal law. For decades, marijuana has been listed as a schedule I controlled substance under both the Federal Controlled Substances Act ("CSA"), 21 U.S. Code Chapter 13, and the Nevada Uniform Controlled Substances Act, NRS chapter 453. *See* 21 CFR § 1308.11; NAC 453.510. At the federal level, the DEA lists marijuana as a schedule I controlled substance. This has been the case since Congress enacted the CSA in 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236 (October 27, 1970). The Nevada Legislature first listed marijuana as a schedule I controlled substance when it enacted the Nevada Uniform Controlled Substances Act in 1971. *See* 1971 Nev. Stats. ch. 667 §§ 1-154 at 1999-2048. In 1981, the Nevada Legislature empowered the Board to designate, by regulation, the substances to be contained in each schedule. *See* 1981 Nev. Stats. ch. 402 §§ 1-39 at 734-750. The schedule I designation indicates that the substance has no accepted medical use in treatment in the United States. 21 U.S.C. § 812(b)(1); NRS 453.166(2). Although Nevada and other states have recognized through voter-approved initiatives that marijuana has medicinal qualities, the FDA has thus far

rejected the proposition that marijuana has an acceptable pharmaceutical use. Indeed, ". . . given the high degree of reproductive variability of cannabis, as indicated by new genetic tests being done on a range of samples, it is unlikely that the psychoactive part of cannabis in its natural state, and the way in which it is traditionally rolled and smoked, would give anywhere near the predictable and quantifiable product and clinical test results needed to satisfy the FDA." Sean M. O'Connor and Erica Lietzen, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 Am. U.L. Rev. 823, 831 (Feb. 2019) (internal citations omitted).

Despite the FDA's position on marijuana, the *Nevada Medical Marijuana Initiative* amended article 4 of the Nevada Constitution in 2000 by adding § 38, stating that "[t]he legislature shall provide by law for . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of" certain medical conditions. Ballot Question No. 9, 1998 and 2000. The Nevada Legislature implemented the constitutional amendment *via* Assembly Bill No. 453, enacted in the 2001 Legislative Session and subsequently codified it in NRS chapter 453A. The *Initiative to Regulate and Tax Marijuana*, enacted in 2016 and codified as NRS chapter 453D, subsequently authorized the regulation and taxation of marijuana for adult recreational use.

By passage of Assembly Bill No. 533 in 2019, the Nevada Legislature repealed NRS chapters 453A and 453D and replaced them in their entirety with NRS title 56. Activity within the scope of NRS chapter 678C (Medical Use of Cannabis) and NRS chapter 678D (Adult Use of Cannabis) is exempt from prosecution by district attorneys and the attorney general; otherwise, activities involving marijuana remain unlawful under Nevada law. Most activities involving marijuana remain unlawful under federal law to the extent that those activities have a "nexus" to interstate commerce. *See United States v. Genao*, 79 F.3d 1333, 1335 (2nd Cir. 1995).

There is overlap between Nevada law and federal law to the extent that controlled substances may not be sold or delivered to a consumer except pursuant to a prescription, *see* 21 C.F.R. §§ 1303.03–1303.06, and then only if the prescription is for a controlled substance that the FDA has approved for interstate distribution, *see* 21 U.S.C. § 355. Federal law defers to Nevada law as to who may issue a prescription for a controlled substance. *See* 21 C.F.R. 1306.03. Nevada law authorizes a variety of different health care practitioners registered with the Board, including physicians, dentists, and advanced practice registered nurses, to issue prescriptions for controlled substances other than those listed in schedule I.[2] *See*

[2] One form of FDA-approved dronabinol, a synthetic cannabinoid, is listed in schedule II and another form listed in schedule III; these FDA-approved drugs are dispensed by pharmacies. *See, e.g.*, *County of Santa Cruz v. Ashcroft*, 279 F.Supp. 2d. 1192, 1203, n. 10 (N.D. Ca. 2003).

NRS 453.126; NRS 453.226. "Prescription" is a statutorily defined term that refers to an order given by such a practitioner to a pharmacy or to the practitioner's patient. *See* NRS 453.128; 21 C.F.R. § 1300.01. Generally, a prescription must be dispensed by a licensed pharmacy, or by a licensed practitioner who holds a dispensing license. *See* NRS 453.226; NRS 639.23505; 21 C.F.R. §1306.06.

Article 4, § 38 of the Nevada Constitution conspicuously avoids using the term "prescription" in describing the method by which a consumer may acquire marijuana. In this regard, the provision states that the consumer may acquire marijuana "upon the *advice* of his physician." Nev. Const. art. 4, § 38(1) (emphasis added). Clearly, the purpose of this syntactical choice was to avoid a direct clash with state and federal pharmacy law governing the manufacture, distribution, and dispensing of prescription drugs. *See Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (distinguishing the ability of doctors in states with medical marijuana laws to "recommend" rather than "prescribe" marijuana in potential violation of the CSA). Additionally, it should be noted that the constitutional amendment required legislative implementation; it was not self-executing when it became effective in 2000. *See Wren v. Dixon*, 40 Nev. 170, 195–96, 161 P. 722, 729 (1916) (constitutional provision is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the

force of law). The Nevada Legislature implemented the initiative by enacting Assembly Bill No. 453 in the 2001 Legislative Session, codified as NRS chapter 453A; however, marijuana's listing in NAC 453.510 was left untouched, as were the provisions of NRS chapter 453 authorizing the Board to list controlled substances in adherence to federal law.

The Board has listed marijuana as a controlled substance pursuant to an explicit delegation of authority from the Nevada Legislature. Codified at NRS 453.146(1), that delegation of authority states that the Board "may add substances to or delete or reschedule all substances enumerated in schedules I, II, III, IV and V by regulation." NRS 453.146(3) further states, "The Board may consider findings of the *federal Food and Drug Administration or the Drug Enforcement Administration* as prima facie evidence relating to one or more of the determinative factors." NRS 453.146(3) (emphasis added). Additionally, NRS 453.166 states, "The Board shall place a substance in schedule I if it finds that the substance . . . [h]as a high potential for abuse . . . and [h]as no accepted medical use in treatment in the *United States* or lacks accepted safety for use in treatment under medical supervision." (emphasis added).

The FDA has determined that marijuana has a high potential for abuse and no accepted medical use in treatment in the United States. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53687 (DEA 2016) and

Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53767 (DEA 2016). *See also* 21 C.F.R. § 1308.11(d)(31). Despite this unequivocal finding, the District Court determined that the Board's listing of marijuana as a schedule I controlled substance "violates" NRS 453.166. (JA 0057:2–3, 0061:9–10).

The unstated premise for the District Court's conclusion is that the meaning of the term "use in treatment in the United States" changed after the passage of the voter-approved initiative that amended the Nevada Constitution in 2000. *See* Nev. Const. art. 4, § 38. Prior to 2000, "use in treatment in the United States" referred to use in treatment in any of the United States as determined by reference to state and federal law. *See Ceballos v. NP Palace, LLC*, 138 Nev. Adv. Op. 58, 514 P.3d 1074, 1077–78 (2022) (holding that "lawful in this state" refers to both state and federal law). According to the District Court, the term currently refers to "use within the geographical confines of Nevada" as determined solely by reference to the voter-approved initiative. (JA 0056:6–11). Notably, the Nevada Legislature has not amended NRS 435.166 since its enactment in 1971. The District Court did not identify the applicable canon of statutory construction that allows for attribution of a new, post-2000 meaning to the text of that statute. Indeed, there is no such canon of construction. According to the fixed-meaning canon of construction, words must be given the meaning they had when the text was adopted. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012).

Although NRS 453.166 states that the Board may schedule controlled substances in adherence to federal law, the District Court did not address the statute's constitutionality. Given the District Court's conclusion that NAC 453.510 conflicts with the Nevada Constitution, one could reasonably infer that NRS 453.166 also conflicts with the Nevada Constitution. Presumably, the District Court did not explore this issue because CEIC and Poole did not name or serve a proper party to defend the constitutionality of NRS 453.166. *See, e.g.,* NRS 218F.720 (authorizing the Legislative Counsel Bureau to defend the constitutionality of legislation); NRS 30.130 (directing service upon the attorney general when the constitutionality of a statute is challenged). In this appeal, the Board asks the Court to consider these issues and others. Each of the issues raised herein presents a question of law. The Court reviews questions of law *de novo*. *Arguello v. Sunset Stations, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 207 (2011). The District Court erred as a matter of law. Its decision should be reversed.

3. THE DISTRICT COURT FAILED TO ADHERE TO PRINCIPLES OF STATUTORY AND CONSTITUTIONAL INTERPRETATION.

In ruling that the listing of marijuana as a schedule I controlled substance directly conflicts with Nev. Const. art. 4, § 38, the District Court disregarded well-established principles of statutory construction and fabricated a conflict where none exists. "A legislative enactment is presumed to be constitutional absent a clear showing to the contrary." *Starlets Int'l v. Christensen*, 106 Nev. 732, 735, 801 P.2d

1343, 1344 (1990) (citations omitted). Moreover, "[a]gency regulations are presumed valid" and courts "generally defer to an agency's interpretation of a statute the agency is tasked with enforcing." *Nev. Indep. v. Whitley*, 138 Nev. _, 506 P.3d 1037, 1042 (2022) (citations omitted).

"[W]hen 'a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored.'" *State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342 (2002) (*quoting Sheriff, Washoe Cty. v. Wu*, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985)). The constitutionality of a statute is a question of law. *Cornella v. Just. Ct.*, 132 Nev. 587, 591, 377 P.3d 97, 100–03 (2016). "Statutes are presumed to be valid," and the burden is on the challenging party to demonstrate that a statute is unconstitutional. *Id.* Nevada courts "construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Id.*

Nev. Const. art. 4, § 38 is susceptible to a reasonable interpretation that avoids any direct conflict with the NAC 453.510, since marijuana's continued designation in schedule I does not impair the constitutional right of a patient in Nevada to use marijuana "upon the advice of a physician." The constitutional right conferred by Nev. Const. article 4, § 38 does not require that marijuana have an "accepted medical use in treatment in the United States"—as is required for prescription drugs pursuant to NRS 453.166(2). CEIC and Poole do not allege that patients are unable to use

marijuana on the advice of a physician due to the Board's regulatory activity. Under Nevada law, physicians are free to advise their patients to use marijuana. Although they cannot issue a prescription to a licensed pharmacy, they can certainly direct their patients to the nearest dispensary. In summary, Nev. Const. art. 4, § 38 does not clash in any respect with Nevada pharmacy law. Accordingly, there is no basis for the District Court's conclusion that the constitutional provision conflicts with NAC 453.510.

Additionally, the District Court unreasonably failed to account for how Nevada pharmacy law interfaces with federal law. "The court[s] must interpret a statute in a reasonable manner, that is, '[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.'" *Flamingo Paradise, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (*quoting Desert Valley Water Co. v. State, Engineer,* 104 Nev. 718, 720, 766 P.2d 886, 886–87 (1988)). NRS 453.146 and NRS 453.166-.219 delegate to the Board the responsibility to schedule controlled substances using the same criteria that the DEA applies when scheduling drugs under federal law. *See* 21 U.S.C. § 812.

Furthermore, the Board's regulatory activities complement the FDA's regulatory activities. Until the FDA approves a drug for manufacture, the drug cannot enter the pharmaceutical supply chain. *See* 21 U.S.C. § 355. If the Board's

licensees and registrants cannot handle or distribute a controlled substance due to restrictions imposed by the FDA, the Board must impose similar restrictions as a means of protecting the integrity of pharmaceutical drugs as they flow through the stream of commerce into Nevada. Therefore, the Nevada Controlled Substances Act largely defers to DEA and FDA determinations regarding a particular substance, including whether that substance has accepted medical use in treatment in the United States. *See* NRS 453.146(3); NRS 453.166; NRS 453.2186; NRS 453.2188.

In other words, the structure and design of the Nevada Controlled Substances Act indicates that the Nevada Legislature intended for the Board to have the discretion to maintain consistency with federal law. The District Court incorrectly suggests the Board must adopt a legal position that theoretically puts its licensees and registrants in jeopardy of violating federal law. When the District Court ruled that the accepted medical use of cannabis is "enshrined" in the Nevada Constitution, it mistakenly equated the right of a Nevada patient to use marijuana "upon the advice of a physician" with marijuana having "accepted medical use in treatment in the United States." This superficial analysis ignored that "medical use in treatment in the United States" refers specifically to FDA-approved controlled substances distributed in interstate commerce.

Furthermore, the District Court ignored legislative history. Since the Nevada Legislature first adopted medical marijuana statutes in 2001, it has in every

legislative session reviewed and amended the chapters of NRS regulating the medical and adult recreational use of marijuana, initially NRS chapters 453A and 453D, and subsequently NRS title 56. Throughout that time, the Legislature made no material amendments to the provisions of statute that authorize the Board to schedule marijuana in adherence to federal law. Given this history, it is reasonable to conclude that the continued scheduling of marijuana in NAC 453.510 is consistent with legislative intent. "[A]cquiescence by the legislature . . . may be inferred from its silence during a period of years." *Oliver v. Spitz*, 76 Nev. 5, 9, 348 P.2d 158, 160 (1960), cited with approval in *Imperial Palace. Inc. v. State, Dept. of Taxation*, 108 Nev. 1060, 1068, 843 P.2d 813, 818 (1992). "[A] regulation that has been in effect for approximately twenty-five years should not be disturbed, since the legislature has acquiesced in the agency's interpretation." *Bing Constr. Co. v. Nev. Dep't of Taxation*, 109 Nev. 275, 279, 849 P.2d 302 (1993) (citing *State ex rel. Nev. Tax Comm'n v. Saveway Super Serv. Stations*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983).

Finally, in ruling that the Board's long-standing authority to schedule marijuana was repealed by implication (JA 129–132), the District Court acted contrary to long-standing Nevada Supreme Court precedent establishing that "repeals by implication are not favored." *Thorpe v. Schooling*, 7 Nev. 15, 17 (1871); *see also State ex rel. Hallock v. Donnelly*, 20 Nev. 214, 217, 19 P. 680, 682 (1888);

Gill v. Goldfield Consol. Mines Co., 43 Nev. 1, 7-9, 176 P. 784, 786-87 (1919); *Warren v. De Long*, 57 Nev. 131, 145, 59 P.2d 1165, 1169 (1936); *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972); *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001). The District Court speculated that the Board was divested of any jurisdiction over marijuana with the enactment of NRS title 56 (JA 129–132), yet it made no coherent argument to support the proposition that NRS chapter 453 and NRS title 56 overlap or conflict. As noted above, CEIC and Poole do not allege that they have been unable to lawfully procure or use marijuana in the manner contemplated by NRS title 56. This is perhaps the strongest proof of all that no conflict exists. Further proof exists in the plain language of NRS 453.005. That statute states, "[t]he provisions of this chapter do not apply *to the extent that they are inconsistent* with the provisions of title 56 of NRS." NRS 453.005 (emphasis added). This indicates that the Nevada Legislature intended for the two sets of laws to coexist. Contrary to the District Court's conclusion (JA 132:8–13), nothing in this language suggests that by enacting NRS title 56, the Nevada Legislature intended to supplant the Board's authority to schedule controlled substances in adherence to federal standards.

The District Court failed to apply well-established canons of statutory construction when it concluded that NAC 453.510 conflicts with the Nevada Constitution. The District Court failed to apply well-established canons of statutory

construction when it opined that NAC 453.510 violates NRS 453.166. In fact, these two positions are logically inconsistent. Since NAC 453.510 flows logically from NRS 453.166, one would rationally conclude that NRS 453.166 also conflicts with the Nevada Constitution. Yet, the District Court did not strike NRS 453.166 as being unconstitutional. In a nutshell, the District Court's decision is illogical. The decision should be reversed.

B. THE DISTRICT COURT MISAPPLIED THE LEGAL STANDARD FOR GRANTING *MANDAMUS* RELIEF.

The District Court issued a writ of *mandamus* ordering the Board "to remove cannabis from the list of schedule I controlled substances." (JA 154:24–25). Courts of general jurisdiction may issue a writ of *mandamus* "to compel the performance of an act which the law requires as a duty resulting from an office or where the discretion has been manifestly abused or exercised arbitrarily or capriciously." *Hildt v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 12, 483 P.3d 526, 529 (2021) (citation omitted). "[M]andamus will not issue unless the petitioner can show that the respondent has a clear, present legal duty to act." *Howell v. Ricci*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1049 (2008) (citations and internal quotation marks omitted). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of

law." *See State v. Eighth Judicial Dist. Court (Schneider)*, 132 Nev. 600, 604, 376 P.3d 798, 801 (2016) (citation omitted).

The District Court failed to identify the clear, present legal duty that the Board allegedly neglected to perform. While the District Court noted that the Board has a statutory duty to annually review its regulations, it identified no evidence suggesting that the Board neglected to annually review its regulations. (JA 148). Indeed, the source of the Board's clear, present legal duty to amend NAC 453.510 is anything but clear. Although the District Court suggested that NRS 453.166 gives rise to such a duty, it ignored the plain language of that statute to reach its conclusion. (JA 149). Further, the District Court seemingly abandoned its search for a clear, present legal duty after summarily concluding that this case presents an issue of public importance. (JA 147:1–8).

Moreover, the District Court did not explain how the Board *manifestly* abused its discretion. It did not explain how the Board acted in an arbitrary and capricious manner. It pointed to no evidence from which a reasonable jurist might infer that the Board acted with prejudice or preference rather than on reason. In the end, the District Court ostensibly determined that the Board was obligated to conduct a detailed judicial inquiry into the supposed conflict between NAC 453.510 and article 4, § 38 of the Nevada Constitution. While the District Court devoted 18 pages of opaque constitutional analysis to its inquiry, administrative agencies take their cues

from the plain language of the statutes that they are charged with enforcing, and abuses of discretion typically occur within the context of contested cases. *See Eighth Judicial Dist. Court (Schneider)*, 132 Nev.at 604, 376 P.3d at 801 (2016). Here, there was no contested case, and nothing in statute to alert the Board that it was at the center of a "paradigm shift" involving the slow passage of untested marijuana laws between 2001 and 2019. (JA 131:18–19). The District Court did not have a legal basis upon which to issue a writ of *mandamus*.

Further, the District Court fashioned an unlawful remedy for the Board's alleged misfeasance. Having ordered the Board to remove language from NAC 453.510, as opposed to simply declaring the regulation unenforceable and unconstitutional, the District Court exceeded the scope of its own authority. Upon a successful challenge to the constitutionality of an administrative regulation, the regulation is unenforceable, and the role of the judiciary is to enjoin the agency's enforcement of that regulation. "[A]n unconstitutional law is no law at all." *Meagher v. Cty. of Storey*, 5 Nev. 244, 250 (1869); *see also We the People Nev. v. Miller*, 124 Nev. 874, 890, n. 55, 192 P.3d 1166, 1177, n. 55 (2008). Because the ordered declaratory relief was an adequate remedy at law, the District Court had no discretion to issue a writ of *mandamus*. NRS 34.170 (writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law); *Walker v. Second Judicial Dist. Court*, 136 Nev.__, 476 P.3d 1194, 1197

(2020) ("Because *mandamus* is an extraordinary remedy, this court does not typically employ it where ordinary means, already afforded by law, permit the correction of alleged errors.").

Moreover, the District Court ordered the Board to rewrite the regulation, thus violating the separation of powers doctrine by intruding upon the Board's core function of enacting, repealing, and/or amending administrative regulations. *See Comm'n on Ethics v. Hardy*, 125 Nev. 285, 287, 212 P.3d 1098, 1100 (2009) (intrusion upon a core legislative function violates the separation of powers doctrine). The act of physically amending a regulation is a legislative function that results from a delegation by legislative branch to the executive branch. *See Clark Cty. v. Equal Rights Comm'n*, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991). If a court of general jurisdiction may issue a writ of *mandamus* to a legislative or quasi-legislative body anytime that it strikes a law on constitutional grounds, then the *mandamus* standard is completely without limiting principles. It is not the role of the judiciary to physically rewrite statutes and regulations. Indeed, there is no precedent for the order that the District Court issued in this case. The District Court's order should be reversed.

C. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT CEIC AND POOLE HAVE STANDING TO CHALLENGE NAC 453.510.

The District Court erred when it concluded that CEIC and Poole have standing to challenge the constitutionality of NAC 453.510. (JA 146:11–147:12). CEIC and Poole suggest that their standing to challenge the constitutionality of NAC 453.510 is based upon the "collateral consequences" associated with law enforcement activity. (JA 0006:3; 0021:13–15; 0024:8–9). To the extent that persons are subject to federal criminal prosecution for interstate trafficking in schedule I controlled substances, those cases are typically prosecuted pursuant to 21 U.S.C. § 841. Under this federal statute, the criminal penalties for trafficking in marijuana vary depending upon the quantity of marijuana involved. *See* 21 U.S.C. § 841(c). Nevada has adopted a similar sliding-scale approach to the punishment of offenses involving contraband marijuana. *See, e.g.,* NRS 453.096; NRS 453.339; NRS 453.3393. Nevada law does not punish marijuana-related offenses in reference to marijuana's listing as a schedule I controlled substance. *See id.* As with federal law, punishments vary depending upon the quantity of contraband marijuana involved in any given transaction.

CEIC and Poole sued the Board for maintaining marijuana on its list of schedule 1 controlled substances, ostensibly because the listing has some relevance to law enforcement and prosecutorial agencies. It does not. As explained above, the schedule I listing promotes the integrity of interstate pharmaceutical supply chains. Nevada law enforcement agencies do not use it for purposes of up-charging crimes

or seeking higher-than-usual sentences. Below, CEIC and Poole did not point to a single example where marijuana's schedule I designation was used as the basis for a charging or sentencing decision. Ultimately, CEIC and Poole failed to identify a nexus between the Board's regulatory activity and the "collateral consequence" injuries allegedly suffered by Poole and other persons similarly situated.

Establishing such a nexus is key to demonstrating standing. When a litigant makes a facial or as-applied challenge to the constitutionality of a statute or regulation, this Court has held that the litigant must demonstrate harm fairly traceable to the law that invalidating it would redress. *Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d 768, 770 (1988). If the litigant cannot establish this link, the controversy is nonjusticiable. *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225–226 (2006). This is also true for organizational plaintiffs that assert "associational" or "organizational" standing. In this regard, Nevada generally adheres to federal principles of justiciability as they apply in the federal courts. *See N.A. of Mut. Ins. Cos. v. State Dep't of Bus. & Indus.,* 139 Nev.__, 524 P.3d 470, 476 (2023). More specifically, this Court has stated that "the Nevada Constitution includes a robust separation of powers clause" that operates like Article III of the U.S. Constitution. *Id.* To demonstrate organizational standing, for example, a plaintiff must demonstrate that the challenged law frustrates

its organizational mission. *See State Dep't of Bus. & Indus.,* 524 P.3d at 478, n. 1 (*citing Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919–21 (D.C. Cir. 2015).

Although CEIC claims to "provide[] support to individuals from underrepresented communities as they apply for licenses to participate in the legal cannabis market," CEIC fails to explain how its lawsuit against the Board promotes that mission. (JA 0021:5–6). In the end, this case presents an abstract controversy about the legal barriers to entry into the legal cannabis market. Inexplicably, the District Court weighed in on the controversy, ordering the Board to "remove cannabis from the list of schedule I substances." (JA 0061:24-25). Any decision to remove marijuana from schedule I is for the Nevada Legislature.[3] Because the District Court erred on the question of standing, its decision should be reversed and summarily remanded with instructions to enter judgment in favor of the Board.

D. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES.

The District Court awarded attorney's fees pursuant to NRS 34.270, the application of which is confined to cases where a writ of *mandamus* issues. As discussed above, *mandamus* has no applicability to this case because the District Court misapplied the *mandamus* standards. Furthermore, an award of attorney fees

[3] During the 2023 session, the Nevada Legislature adopted a resolution urging Congress to remove marijuana from schedule I. *See* Assembly Joint Resolution No. 8 of the 82nd Session of the Nevada Legislature (2023). Wisely, it did not disturb existing Nevada pharmacy law as it pertains to controlled substances.

as a cost of litigation is prohibited absent authorization by agreement, statute, or rule. *Pardee Homes v. Wolfram*, 135 Nev. 173, 176, 444 P.3d 423, 426 (2019). The District Court acknowledged that "NRS 34.270 does not explicitly use the term 'attorney fees,' and the Nevada Supreme Court has never directly determined whether NRS 34.270 includes the recovery of attorney fees." (JA 348:26-349:1).

Nevertheless, the District Court awarded attorney's fees pursuant to NRS 34.270 under the justification that "statutes, rules, and agreements with language analogous to NRS 34.270 as well as statutes practically identical to NRS 34.270 from neighboring statutes [sic] have authorized the recovery of attorney fees." (JA 350:12-14). There was no legal basis for an award of attorney fees in this action. *See Sun Realty v. Eighth Judicial Dist. Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975) (not within the "inherent power of the court" to award costs and attorney's fees in the absence of a statute or rule).

Neither the word "costs" nor "damages" in NRS 34.270 is reasonably construed to encompass attorney's fees. Other Nevada statutes expressly use the term "attorney's fee," "attorney's fees", or "attorney fee" when "costs" or "damages" are also recoverable. *See, e.g.,* NRS 18.010; NRS 31.340; NRS 239.170. However, the District Court consulted the law of other states in reaching its conclusion about the availability of attorney's fees. On the other hand, federal law undermines the District Court's conclusion. For example, in civil rights cases, 42

U.S.C. § 1988 expressly allows for the recovery of "a reasonable attorney's fee as part of the costs" of the action. 42 U.S.C. § 1988.

Each of the above statutes indicates that "costs," "damages," and "attorney's fees" are terms of art with a specific meaning. "Generally, when a legislature uses a term of art in a statute, it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature intended it to be interpreted in the same fashion." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1139–40 (2004). Therefore, the legislative omission of the term "attorney's fees" indicates that attorney's fees are not recoverable under NRS 34.270. The District Court erred in awarding attorney's fees to CEIC and Poole. Its decision should be reversed.

VIII. CONCLUSION

The District Court abandoned its duty to apply principles of justiciability to the claims advanced by CEIC and Poole, ultimately deciding an abstract controversy about "collateral consequences" associated with law enforcement activity. Further, the District Court contrived a legal conflict and incorrectly concluded that the enactment and implementation of medical marijuana laws divested the Board of its authority to preclude its licensees and registrants from distributing marijuana in interstate commerce. Finally, the District Court incorrectly concluded that the CEIC and Poole are entitled to recover attorney's fees under *mandamus* statutes. The

District Court's decision should be reversed and remanded with instructions to enter judgment in favor of the Board.

Respectfully submitted this ___day of June 2023.

By:*/s/ Gregory L. Zunino*

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Nevada Rules of Appellate Procedure, specifically NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of June 2023.

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CERTIFICATE OF SERVICE

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

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/s/ Peter Keegan
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