IN THE SUPREME COURT OF THE STATE OF NEVADA

GREENMART OF NEVADA NLV LLC, a Nevada limited liability company; NEVADA ORGANIC REMEDIES, LLC; and LONE MOUNTAIN PARTNERS, LLC, a Nevada limited liability company, Appellants, vs. SERENITY WELLNESS CENTER LLC; TGIG, LLC; NULEAF INCLINE DISPENSARY, LLC; NEVADA HOLISTIC MEDICINE, LLC; TRYKE COMPANIES SO NV, LLC; TRYKE COMPANIES RENO, LLC; PARADISE WELLNESS CENTER, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; and THE STATE OF NEVADA DEPARTMENT OF TAXATION, Respondents.	Electronically Filed Jan 23 2020 09:25 p.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO: 79668 DISTRICT COURT CASE NO.: A-19-786962-B

APPELLANT GREENMART OF NEVADA NLV LLC'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

More than 10% of the ownership interest of Appellant GreenMart of Nevada NLV, LLC ("GreenMart") is owned by CGX Life Sciences, Inc. ("CGX"), a Nevada corporation. GreenMart has submitted a Notice of Transfer of Interest to the Nevada Department of Taxation's Marijuana Enforcement Division for a transfer of ownership of CGX from MPX Bioceutical Corporation to iAnthus Capital Holdings, Inc., a Canadian publicly traded company. That transfer is currently pending approval.

DATED this 23rd day of January, 2020.

/s/ Alina M. Shell

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JURISDICTIONAL STATEMENT

This is an appeal from an order entered by the district court granting a motion for a preliminary injunction. The district court entered findings of fact and conclusions of law ("FFCL") granting a preliminary injunction on August 23, 2019 (22 AA5277-5300[1]), and the notice of entry of order was filed and served on August 28, 2019. (23 AA5544-5570.) GreenMart filed a timely notice of appeal on September 19, 2019. (24 AA5934-49); *see also* NRAP 4(a)(1) (mandating that a notice of appeal must be filed no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served). This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(3), which provides that an order granting or refusing to grant an injunction is an appealable determination.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to several provisions of NRAP 17(a). Pursuant to NRAP 17(a)(2), this Court retains jurisdiction because this appeal involves a ballot initiative. The Court also retains jurisdiction under NRAP 17(a)(8) because it is an administrative agency case involving Department of Taxation determinations. The Court also retains

[1] On January 10, 2020, Appellant Nevada Organic Remedies filed its Opening Brief and Appendices in this matter. Citations to Appellants' Appendix ("AA") are to both volume and page number. Hence, "22 AA5277-5300" refers to Volume 22 of Appellants' Appendix at pages 5277 through 5300.

jurisdiction over this matter pursuant to NRAP 17(a)(9) because it is a matter originating in business court. The Court also retains jurisdiction pursuant to NRAP 17(a)(12) because this is a matter raising as a principal issue a question of statewide importance regarding the current and future landscape of the legal recreational marijuana industry in Nevada.

ISSUES PRESENTED FOR REVIEW

A. Whether Respondents have standing to sue the State of Nevada, Department of Taxation (the "Department") for violations of Nev. Rev. Stat. § 453D.200(6);

B. Whether the district court lacked jurisdiction to consider Respondents' petition for judicial review where Respondents failed to name all affected parties.

C. Whether the district court erred by substituting the Department's interpretation of Nev. Rev. Stat. § 453D.200(6) with its own;

D. Whether the district court erred in finding that Appellants did not list each of their prospective owners in their applications to open recreational marijuana establishments sufficiently to conduct the background checks required by Nev. Rev. Stat. § 453D.200(6);

E. Whether the district court abused its discretion by failing to make any findings regarding irreparable harm Respondents would suffer if the preliminary injunction was denied;

F. Whether the district court deprived GreenMart of due process by ordering the Department to provide information about GreenMart's compliance with Nev. Rev. Stat. § 453D.200(6) but not requiring the same information regarding Respondents' compliance with the statute;

G. Whether Respondents are barred from challenging the regulations set forth in NAC 453D.255(1) by the doctrine of laches or the doctrine of equitable estoppel.

I. STATEMENT OF THE CASE

On April 22, 2019, the district court temporarily coordinated a preliminary injunction hearing in four cases filed by several unsuccessful applicants for Nevada recreational marijuana establishment licenses (the "Unsuccessful Applicants"); the district court entered an order regarding coordination on July 11, 2019.[2] (20 AA4934-40.) The cases were filed against the State of Nevada Department of Taxation (the "Department"), and each lawsuit challenged the process the Department used in 2018 to accept and review applications for recreational marijuana establishment licenses and challenged the allocation of licenses. (*See, e.g.*, 29 AA7131-53 (Serenity Plaintiffs' Second Amended Complaint).)

GreenMart was a successful applicant in the 2018 licensing process and was awarded four conditional licenses. (*See* 11 AA2557-63 (2018 retail marijuana store applications scores and rankings); 16 AA3981-85 (same).) Along with several other recipients of conditional licenses (the "Successful Applicants"), GreenMart moved

[2] The four coordinated cases were *Serenity Wellness Center, LLC et al. v. Department of Taxation*, Case No. A-19-786962-B; *ETW Management Group, LLC et al. v. Department of Taxation*, Case No. A-19-787004-B; *MM Development Company, Inc. et al. v. Department Of Taxation*, Case No. A-18-785818-W; and *Nevada Wellness Center, LLC v. Department Of Taxation*, Case No. A-19-787540-W.

to intervene in the coordinated cases. Relevant here, GreenMart moved to intervene in the matter filed by Respondents on April 2, 2019. (5 AA1094-1126.) The district court entered an order on April 16, 2019 granting GreenMart's motion to intervene. (6 AA1308-12.)

The Unsuccessful Applicants' motions for a preliminary injunction were based on assertions that the licensing process was flawed and that their claimed rights to a license were impacted by the Department's faulty process. The Unsuccessful Applicants used the evidentiary hearing as a vehicle to engage in a four-month fishing expedition into every aspect of the licensing process, attacking nearly every decision the Department made in accepting and grading applications in hopes of finding a reversible flaw.

In the end, while the district court rejected the bulk of the Unsuccessful Applicants' arguments, it granted a preliminary injunction based on a single legal issue that was not raised by any of the Unsuccessful Applicants, finding that the Department, in promulgating NAC 453D.255(1), arbitrarily and capriciously modified Nev. Rev. Stat. § 453D.200(6), which requires the Department to conduct a background check of "each prospective owner" of a license applicant. (22 AA5298.) NAC 453D.255(1) purported to limit the application of Nev. Rev. Stat. § 453D.200(6) to those owners "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." Determining that the adoption of NAC

453D.255 and its 5 percent threshold was an "impermissible deviation" from Ballot Question 2, the court issued a preliminary injunction enjoining the Department from conducting a final inspection for any applicant that did not include "each prospective owner" in its application. (22 AA5298; 5300.)

The district court also ordered the Department to provide the court with information regarding "which of the successful applicants . . . complied with the statute, as opposed to the Department's administrative change to the statute which limited it to a 5 percent or greater ownership interest." (46 AA11329.) To the extent the Department determined that an applicant had not complied, the Department would be enjoined from conducting a final inspection of that applicant. This would effectively prevent those applicants—including GreenMart—from opening their conditionally-licensed marijuana establishments for business.

In making its decision, the district court ignored the fact that the same 5% Rule was already in place in the Nevada Administrative Code for the regulation of medical marijuana establishments. *See* NAC 453A.302(1). This regulation was adopted and has been applied since 2014 with respect to medical marijuana establishments. In fact, the September 2018 application solely permitted applicants that were already medical marijuana license holders. Accordingly, the same 5% ownership threshold had already been applied to the September 2018 applicants. Similar 5% ownership thresholds are codified in Nevada's gaming statutes and

federal securities regulations. As evidenced by its prior application to both the medical marijuana and gaming industries, this ownership threshold is a reasonable and necessary provision to permit the Department to regulate the recreational marijuana industry. Furthermore, both the Department and other witnesses testified during the hearing that it would be impossible to conduct background checks of every single owner of a recreational marijuana establishment if that establishment were a public company whose shareholders may change on a daily (or even more frequent) basis.

By rejecting the 5% Rule, the district court not only failed to provide the Department the deference it was due but also adopted a rigid interpretation of Nev. Rev. Stat. § 453D.200(6) that leads to absurd results because it would effectively bar any publicly traded company from operating in Nevada's recreational marijuana industry. Such an outcome ignores the reality that numerous publicly traded companies are already operating both medical and recreational marijuana establishments in Nevada. Moreover, the statute does not indicate any intention to bar publicly traded companies from operating marijuana establishments in Nevada.

Moreover, the district court's findings ignore that Nev. Rev. Stat. § 453D.200(1) specifically grants the Department authority to "adopt all regulations necessary or convenient to carry out" the operation of marijuana establishments and explicitly directs the Department to avoid making the operation of a marijuana

establishment "unreasonably impracticable." *See* Nev. Rev. Stat. 453D.200(1). The district court's rejection of the 5% Rule not only ignores agency deference and contradicts the terms of the statute but also harms the entire industry, as publicly traded companies own and operate many of the best establishments in the state of Nevada.

II. STATEMENT OF FACTS

A. Relevant Facts Regarding the September 2018 Application Period.

On November 8, 2016, Nevada voters passed the Regulation and Taxation of Marijuana Act (Ballot Question 2) (the "Act"), an act which legalized the purchase, possession, and consumption of recreational marijuana for adults 21 and older. The Department was to adopt regulations necessary to carry out the Act, including regulations that set forth the "[p]rocedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment" and "[q]ualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment." Nev. Rev. Stat. § 453D.200(1)(a)-(b). Further, Nev. Rev. Stat. § 453D.200(1) directed the Department to "adopt all regulations necessary or convenient to carry out the provisions of" NRS 453D, with the proviso that those regulations "must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable."

Pursuant to Nev. Rev. Stat. § 453D.210(2), for the first 18 months after the Department began to receive applications for marijuana establishments, the Department could only accept applications for licenses for marijuana establishments from "from persons holding a medical marijuana establishment registration certificate pursuant to chapter 453A of NRS."

On January 16, 2018, the Nevada Tax Commission unanimously approved permanent regulations ("Approved Regulations"). LCB File No. R092-17. The Approved Regulations went into effect on February 27, 2018. Thereafter, on August 16, 2018, the Department issued a Notice of Intent to Accept Applications ("Notice") for sixty-four (64) recreational marijuana retail store licenses to be located throughout various jurisdictions in Nevada. The Notice required that all applications be submitted between 8:00 a.m. on September 7, 2018 and 5:00 p.m. on September 20, 2018. Pursuant to section 80 of the Approved Regulations—later codified as NAC 453D.272—if the Department received more than one complete and qualified application for a license the Department would rank all applications within each jurisdiction from first to last based on compliance with NRS § 453D and the Approved Regulations. R092-17, Sec. 80; NAC 453D.272(1). The Department was then required to go down the list and issue the highest scoring applicants the available licenses. NAC 453D.272(3).

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Between September 7, 2018 and September 20, 2018, the Department accepted applications for licenses to open recreational marijuana establishments throughout Nevada. It received over 460 applications, all from applicants who already held medical marijuana licenses in the state. (47 AA11569-011575 (list of all applicants).) Pursuant to Nev. Rev. Stat. § 453D.210(4), the Department had 90 days to grade and rank the qualifying applications, and it finished the task using qualified independent contractors hired for this specific purpose in order to protect the grading process from bias. (33 AA8243-44.)

The Department awarded conditional licenses to the highest scoring applicants on December 5, 2018. (47 AA11569-11575.) With only 61 licenses available, and over 460 applications submitted, many applicants that were already successfully operating marijuana establishments in Nevada were unsuccessful in obtaining a license. At the time the applications were submitted, many applicants—both successful and unsuccessful—were owned in whole or in part by publicly traded companies. (*See, e.g.*, 42 AA10353, 10354; 43 AA10521; 43 AA10681-84; 44 AA10834). Other applicants were acquired by publicly traded companies soon after applications were submitted and before the preliminary injunction hearing took place. (*See, e.g.*, 44 AA10781; 42 AA10355, AA10356.) As noted above, GreenMart was awarded four conditional licenses based on the strength of its applications.

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B. Unsuccessful Applicants File Suit.

Shortly after the Department allocated licenses to the highest-scoring applicants, several Unsuccessful Applicants brought suits against the Department challenging the application process and alleging improprieties in the applications themselves, the scoring process, and the allocation of the licenses to applicants. (1 AA1 - 2 AA375 (complaints).) Several of the Successful Applicants, including GreenMart, intervened in the lawsuits to protect their conditional license rights and defend the Department's process. (4 AA986-90; 5 AA1127-37; 6 AA1289-92; 6 AA1308-12; 8 AA1820-21.)

Plaintiffs in four of the cases filed motions for preliminary injunction against the Department, seeking to enjoin the opening of any new establishments under the conditional licenses. (4 AA769-878; 6 AA1355-1377; 6 AA1378 - 7 AA1735; 11 AA2535-40.) The district court coordinated four of the cases in Department XI of the Eighth Judicial District Court solely for the purpose of holding an evidentiary hearing on these motions. (20 AA4938-40.)

That evidentiary hearing began on May 24, 2019 and did not conclude until August 16, 2019. (*See* 29 AA7170 - 46 AA11332 (transcripts of Hearing Days 1 through 20).) The moving parties—all of which were Unsuccessful Applicants—used the 20-day hearing to conduct an extensive in-court fishing expedition into the entire application process, casting around for some flaw to justify setting it aside.

The Unsuccessful Applicants took a kitchen-sink approach, challenging everything, including the Department's inclusion of diversity as a grading criterion (4 AA790, 45 AA11108-09), its decision not to allocate points for locations (45 AA11102-03), and its decision to use outside contractors in the grading process. (6 AA1385-86; 45 AA11156.)

C. The Issue Regarding Backgrounds Checks of "Each Prospective Owner" is Raised for the First Time at the Evidentiary Hearing.

Nev. Rev. Stat. § 453D.200(6) requires the Department to "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." Background checks work to preserve public safety, as they help to exclude owners, officers, and board members who have excluded felonies or other histories that would pose a risk to the public. Nev. Rev. Stat. § 453D.020(1).

In considering the ownership of applicants, the Department adopted a regulation in NAC 453D.255(1) providing that, among other things, the background check mandated by Nev. Rev. Stat. § 453D.200(6) would "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment" (the "5% Rule"). An identical 5% rule had been adopted in 2014 for medical marijuana establishments (*see* NAC 453A.302), and witnesses from the Department testified that the 5% Rule was a reasonable interpretation of the statute that was necessary to allow the Department to regulate the industry through

regulations that "aren't unduly burdensome" while also ensuring that "the interests of the State are protected" as well as "public safety." (39 AA10068; *see also id.* at 10067 (testimony of former Department Executive Director Deonne Contine that "the whole idea behind the process was to balance the public safety . . . and the interest of the industry").)

The adoption of the 5% Rule was not unexpected. It had been specifically requested by the industry and was expressly recommended by the Governor's Task Force in 2017 through a working group headed by one of the principals of the Unsuccessful Applicants, John Ritter.[3] (46 AA11436-37.) Before these regulations were adopted in 2018, the Department complied with the process for drafting regulations, sending them to workshops and submitting them to the Legislative Council and to the Legislative Commission for approval. (41 AA10109.)

The 5% Rule serves to ensure that the Department need not conduct background checks of minor shareholders who have no ability to control a company. (41 AA10112[4].) This regulation especially considered the practical application to

[3] John Ritter, an advisory board member, manager, and previous owner of Respondent TGIG, LLC, was one of Respondents' primary witnesses in the evidentiary hearing. Ironically, Ritter was also a sponsor for the "Taxation/Revenue/Regulatory Structure Working Group" on the Governor's Task Force that expressly recommended the 5% Rule be adopted by the Department as a regulation. (46 AA11493.)

[4] (" . . . the thinking was a person with less than a 5 percent ownership is not going to have an ownership interest such that they could sway or there could be situations where they have enough control to bring in -- to sell product out the back door. And

publicly traded companies—which included both Successful and Unsuccessful Applicants—so that the Department would not be required to conduct background checks on hundreds, or even thousands, of nominal shareholders who have no real ability to control the company, and whose shares may trade hands multiple times each day. (42 AA10321 (testimony that conducting a background check on every shareholder in a publicly traded company "would basically shut down the [Department's] ability to operate").)

As Nevada Organic Remedies ("NOR") noted in its Opening Brief, several of the Successful Applicants—including GreenMart—have a publicly traded parent company. (NOR Opening Brief ("OB"), p. 12.) Likewise, several of the Unsuccessful Applicants have publicly traded parent companies. (*Id.*) Before the evidentiary hearing, none of the Unsuccessful Applicants raised the 5% Rule or its application to the requirements of NRS 453D.200(6). (*See generally* 1 AA1 - 2 AA375 (complaints).) It was not until the middle of the evidentiary hearing, when John Ritter—who had recommended the 5% Rule to the Governor's Task Force—was called as a witness and stated his new belief (which directly contradicted his recommendations contained in the Governor's Task Force Report) that the 5% Rule somehow violated NRS 453D.200(6) became an issue. (29 AA7386.)

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so that was a reasonable amount based on feedback from the industry and concerns that they had about how the process had become so burdensome to them, and then also balancing that with the public safety piece.")

D. The District Court Finds the 5% Rule to Be an "Impermissible Deviation" From Ballot Question 2 and Issues a Preliminary Injunction on this Ground.

After Mr. Ritter mentioned the 5% Rule, the district court seized upon the issue and made it a central focus of the hearing. During the evidentiary hearing, the district court expressed its belief that because the recreational marijuana statute was passed by voter initiative, the Department's ability to adopt regulations interpreting the statute was limited. The court frequently stated it believed the Department had less deference in adopting regulations arising from ballot questions than it did in interpreting statutes passed by the legislature due to Article 19, section 2 of the Nevada Constitution, which states that "[a]n initiative measure ... shall not be amended ... by the legislature within 3 years from the date it takes effect."

Throughout the remainder of the hearing, the district court repeatedly criticized the Department's adoption of the 5% Rule as an improper amendment to the language of Nev. Rev. Stat. § 453D.200(6). For example, the court asked Jorge Pupo, then-Executive Director of the Marijuana Enforcement Division for the Department: "Sir, can you explain to me why the Department thought it was a good idea to change the language of the ballot question which said that you had to check each prospective owner's background and change it to anyone who held a 5 percent interest or more?" (37 AA9168; *see also* 39 AA9705 ("So tell me why the Department decided that it was going to use a 5 percent level for owner?").)

Later, former Executive Director Deonne Contine, who was primarily responsible for the Department's adoption of the regulations in NAC 453D, explained that the Department's decision to adopt the 5% Rule by stating that "I believe that it was protecting the public health and safety. And the regulations complied with the statute." (42 AA10292.) The court immediately challenged Ms. Contine's explanation by asking: "So, Ma'am, ***you believed you could substitute your judgments for the voters' of the State of Nevada***?" (*Id.*) (emphasis added)[5]. Ms. Contine responded: "I believe that we went through the process that we went through and we interpreted the provisions and we considered all the responsibilities that we had under the initiative. And I believe that the regulation was validly adopted and it is valid, yes." (42 AA10292-93.)

Despite the Department's explanation of the purpose and utility of the 5% Rule and its existing use in the medical marijuana realm, the district court held that the 5% Rule was invalid. The court's FFCL cited Article 19 of the Nevada Constitution and found, "[w]here, as here, amendment of a voter-initiated law is temporally precluded from amendment for three years, the administrative agency may not modify the law." (22 AA5294, ¶63; 22 AA5295, ¶66.) The district court

[5] This was not the only time the district court directed such pointed questions at Ms. Contine regarding the 5% Rule. Earlier in Ms. Contine's testimony, the court asked Ms. Contine, "So you think that changing the word 'each' to 'each who owns 5 percent or more' is reasonable?" (41 AA10068.) Ms. Contine responded that it was. (*Id.*)

further held that the Department's "deviations" from the requirements of Ballot Question 2 "constituted arbitrary and capricious conduct without any rational basis for the deviation" (22 AA5928, ¶ 81), and that "the Department's decision to not require disclosure on the application and to not conduct background checks on persons owning less than 5% prior to award of a conditional license is an impermissible deviation from the mandatory language of … NRS 453D.200(6)." (*Id.* at ¶ 82.) Based solely upon this "impermissible deviation," the court found a likelihood of success on the merits justifying an injunction. (*Id.*, ¶ 86.)

E. The District Court Uses a One-Sided Process to Determine the Scope of the Injunction.

On August 16, 2019, the last day of the evidentiary hearing, the district court requested the Attorney General's office, which represented the Department, to provide a list of "[w]hich successful applicants completed the application in compliance with NRS 453D.200(6)." (46 AA11329-30.) The purported purpose of this request was to determine which applicants may be subject to the injunction.

Although NRS 453D.200(6) is an obligation ***on the Department*** to conduct background checks and not a requirement for applicants to "complete" their applications, the Attorney General attempted to respond to the court's instruction. On August 22, 2019, the Attorney General sent an email placing each Successful Applicant into one of three "Tiers." (46 AA11406-07.)

Tier 1 was defined to include all Successful Applicants that had not intervened in the actions. In identifying Tier 1 members, the Department did not check ownership, instead relying on the "applicants' attestations regarding who their owners, officers, and board members were at the time of the application." (46 AA11406.) These applicants, for reasons that remain unexplained, were automatically deemed to have complied with NRS 453D.200(6).

Tier 2 included those intervenors "whose applications were complete with reference to NRS 453D.200(6) if the Department of Taxation accepts as truthful who their owners, officers, and board members were." (46 AA11406.)

Finally, Tier 3 included any Successful Applicant for which the Attorney General "could not eliminate a question as to the completeness of their applications with reference to NRS 453D.200(6)." (46 AA11406-07.) Four Successful Applicants were placed in Tier 3, including GreenMart. (46 AA11407.) The AG offered multiple, differing explanations as to why it classified certain parties in Tier 3, including statements about applicants being "acquired by a publicly traded company," or having a "subsidiary of a publicly traded company [that] owned a membership interest in the applicant." (46 AA11407.)[6]

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[6] On August 26, 2019, GreenMart filed an objection to the district court's consideration of the Attorney General's email (22 AA5301-04), as did several other Successful Applicants. (22 AA5305-19; 23 AA5510-32.)

While certain other Successful Applicants in Tier 2 became publicly traded soon after their applications were submitted, the district court instructed the Department only to consider ownership for purposes of background checks as of the date that applications were submitted. This meant that some applicants who are now owned by publicly traded companies, such as the Essence entities, were not placed in Tier 3 because they did not have publicly traded ownership at the time they submitted their application.

Relying entirely on the Attorney General's email, the district court applied the injunction only to those entities listed in Tier 3. This hearing was held on August 29, 2019, after the FFCL had already been filed. (See 46 AA11133-11405.)

F. The District Court Makes No Findings Regarding Irreparable Harm in the Injunction.

This Court has held that injunctive relief is extraordinary relief, and the irreparable harm must be articulated in specific terms by the issuing order or be sufficiently apparent elsewhere in the record. *Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999); *accord Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). However, other than a passing consideration of the harm issuance of the injunction would cause the Department (23 AA5569, ¶ 89) and a passing statement that "a constitutional violation may, by itself, be sufficient to constitute irreparable harm" (*Id.*, ¶ 62), the

district court's FFCL is devoid of any findings that the Unsuccessful Applicants would have been harmed if the injunction did not issue.

III. SUMMARY OF THE ARGUMENT

Ballot Question 2 provided that the Department is to conduct a background check "of each prospective owner, officer, and board member of a marijuana establishment license applicant." In carrying out this and other provisions of the statute, the Department adopted a regulation similar to those already existing in the regulation of medical marijuana establishments, gaming licensees, and securities ownership that applied a 5% threshold for ownership to be considered and reviewed by the Department. As described by the Department itself, the 5% threshold was reasonable and necessary to carry out its responsibilities under the recreational marijuana initiative.

During September 2018, over 460 applicants—all of whom already held medical marijuana licenses and had been previously subjected to background checks—submitted applications to the Department for licenses to operate recreational marijuana establishments. When the Unsuccessful Applicants failed to score well enough to merit award of conditional licenses, they filed a number of lawsuits, all grasping for some reason to undo the application process. While none of the Unsuccessful Applicants identified the 5% Rule as an issue in their respective complaints, during the course of the evidentiary hearing in this matter the 5% Rule

became the focus of the district court's ire and led to the court's entry of a preliminary injunction.

The district court erred in issuing the preliminary injunction based on the existence of the 5% Rule for several reasons. First, because the 2018 application process was not "a proceeding … in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed," Nev. Rev. Stat. § 233B.032, there was no "contested case" and the Unsuccessful Applicants lack standing to challenge the Department's denial of their applications. Second, the Unsuccessful Applicants lack standing because they have never established that the Department's implementation of the 5% Rule caused them an "injury in fact," a prerequisite for standing. *See, e.g. Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 392, 135 P.3d 220, 225 (2006).

Third, the district court lacked jurisdiction over Respondent's petition for judicial review because Respondents failed to comply with the mandatory requirements of Nev. Rev. Stat. § 233B.130 to identify all parties of record who would be affected by judicial review of the Department's issuance of conditional licenses.

Fourth, the district court failed to grant the Department the "great deference" it must be afforded in interpreting and implementing the provisions of Chapter 453D

of the Nevada Revised Statutes and imposed its own, unworkable interpretation of Nev. Rev. Stat. § 453D.200(6). *NuLeaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 136, 414 P.3d 305, 311 (2018). The court's interpretation of Nev. Rev. Stat. § 453D.200(6) creates a result that Nevada voters could not have intended. In reading that statute to require background checks on every single shareholder of a public company, the district court imposed an absurd and impossible obligation upon the Department: conduct a background check on all public company shareholders, no matter the amount of their holdings, their involvement in the business, or even their knowledge of the company itself. The Department's adopted 5% Rule, by contrast, interprets the statute reasonably, requiring background checks on owners who may have actual influence over marijuana license applicants while simultaneously making it practical for the Department to conduct all necessary background checks. In rejecting the 5% Rule, the district court came to an improper legal conclusion that requires reversal of the preliminary injunction.

Fifth, despite clear guidance from this Court that any irreparable harm "must be articulated in specific terms" by an order granting injunctive relief," *Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005), the district court failed to make any findings regarding the harm

the Unsuccessful Applicants would allegedly suffer in the absence of injunctive relief.

Sixth, the district court improperly applied the preliminary injunction to GreenMart. GreenMart did not violate any statute or regulation, but it is now being penalized and precluded from opening its establishments even after disclosing 100% of its ownership. Meanwhile, other successful applicants are not subject to the injunction either by virtue of not intervening in the licensing lawsuits or by transferring ownership to a public company after they submitted their application but before perfecting their licenses. This result is absurd and unreasonable.

Seventh, the district court deprived GreenMart of due process by ordering the Department to provide it with information regarding which Successful Applicants complied with Nev. Rev. Stat. § 453D.200(6) without requiring the Department to provide the same information regarding the Unsuccessful Applicants.

Finally, the Unsuccessful Applicants should have been barred from challenging the Department's implementation of the 5% Rule by the doctrines of laches and equitable estoppel.

For all these reasons, the injunction must be dissolved. Additionally, GreenMart also joins the legal arguments raised by NOR in its Opening Brief. Specifically, GreenMart joins in NOR's arguments in Sections VII(A), (B), (C), and (D)(2) of NOR's Opening Brief.

IV. ARGUMENT

A. Standard of Review

A preliminary injunction is only available when the moving party can demonstrate "the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (citations omitted). For a preliminary injunction to issue, the moving party must demonstrate (1) likelihood of success on the merits, and (2) that the nonmoving party's conduct would cause irreparable harm for which there is no adequate remedy at law. *Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). Injunctive relief is extraordinary relief, and the irreparable harm must be articulated in specific terms by the issuing order or be sufficiently apparent elsewhere in the record. *Id.*; *accord Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762, n.5 (2005).

A district court has discretion in deciding whether to grant a preliminary injunction. *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). The district court's decision "'will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Attorney General v. NOS*

Communications, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (quoting *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir.1992)). Questions of law are reviewed de novo, even in the context of an appeal from a preliminary injunction. *University Sys.*, 120 Nev. at 721, 100 P.3d at 187; *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001).

B. The Unsuccessful Applicants Lack Standing to Challenge the Implementation of Nev. Rev. Stat. § 453D.200(6) Because There Was No "Contested Case."

A fundamental—and insurmountable—issue facing the Unsuccessful Applicants is that they lack standing to challenge the Department's denials of their applications. NAC 453D.996(2) authorizes aggrieved parties to "seek judicial review of a final decision of the Nevada Tax Commission in accordance with the provisions of chapter 233B of NRS that apply to a contested case." However, this is not a "contested case," which is defined as "a proceeding … in which the legal rights, duties or privileges of a party are required by law to be determined by an agency ***after an opportunity for hearing***, or in which an administrative penalty may be imposed." Nev. Rev. Stat. § 233B.032 (emphasis added).

Here, there was no opportunity for a hearing before the Department determined which applicants would receive a conditional license to operate a retail marijuana store. *See* Nev. Rev. Stat. § 453D.210(6) (mandating an "impartial and numerically scored competitive bidding process"—not an opportunity for hearing—

for issuance of licenses); *see generally* NAC 453D.250-312 (describing application process and rules). Indeed, the only hearings contemplated by Chapter 453D of with the Nevada Revised Statutes of Nevada Administrative Code pertain to Department investigations of already-existing marijuana establishments operating pursuant to already-granted licenses, which Respondents do not have. *See* Nev. Rev. Stat. § 453D.200(3)-(4) (authorizing Department to punish licensees for violations after opportunity for hearing); *see also* NAC 453D.940-996 (rules and procedures for Department disciplinary hearings).

The application process was not a "contested case" under Nevada law. Thus, it is clear the legislature did not intend for the Department's denial of a provisional license to be subject to judicial review, and judicial review of the Department's decision in this instance is therefore unavailable to the Unsuccessful Applicants. *See Nevada DPBH v. Samantha Inc.*, 133 Nev. 809, 815-16 407 P.3d 327, 332 (2017) (holding that "a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judicial review under the Administrative Procedure Act or NRS Chapter 453A" because "the application process provided by NRS 453A.322" was not a "contested case").

Accordingly, because the Unsuccessful Applicants lack standing to challenge the Department's denial of their applications, the district court erred in granting them injunctive relief.

C. The Unsuccessful Applicants Lack Standing Because There is No Justiciable Controversy.

Unless the Legislature has provided a statutory right, courts require "an actual justiciable controversy as a predicate to judicial relief*." Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220,225 (2006) (quotation omitted).[7] Under both the federal and state constitutions, standing is a prerequisite to "an actual justiciable controversy." *Id.* at 392, 135 P.3d at 225. The doctrine of standing is part of the constitutional "case or controversy" requirement. *Id.* at 392-93, 135 P.3d at 225; Nev. Const. art. 6, §§ 4, 6. Standing is central to the separation of powers. Nev. Const. art. 3, § 1. It "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citations omitted).

To possess standing, a plaintiff must establish three things: (1) injury in fact; (2) causation; and (3) redressability. *Stockmeier*, 122 Nev. at 392, 135 P.3d at 225. "[T]he 'irreducible constitutional minimum' of standing requires that a plaintiff has suffered an 'injury in fact' that is not merely conjectural or hypothetical, that there be a causal connection between the injury and the conduct complained of, and that it must be likely, as opposed to merely speculative, that the injury will be redressed

[7] Abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

by a favorable [court] decision." *Miller v. Ignacio*, 112 Nev. 930, 936, 921 P.2d 882, 885 n.4 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

An "injury in fact" is one involving "an invasion of a judicially cognizable interest" that is "concrete and particularized" and "actual or imminent." *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *accord Del Webb Conservation Holding Corp. v. Tolman*, 44 F. Supp. 2d 1105, 1112 (D. Nev. 1999). "[A] party must show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (citation omitted). The plaintiff must have a "special or peculiar injury different from that sustained by the general public in order to maintain a complaint for injunctive relief." *Id.* (citing *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929)).

In this case, the Unsuccessful Applicants lack standing for any of the relief they sought in the district court because they have never demonstrated an "injury in fact" for standing to challenge the Department's licensing process or prohibit the Department from issuing and/or recognizing the licenses it awarded GreenMart and the other Successful Applicants. The Unsuccessful Applicants have asserted that they were injured because the Department did not award them any licenses, but have never established—because they cannot—that there is any causal connection between that "injury" and the Department's implementation of the 5% Rule.

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The background check mandate is designed to protect the public by allowing the Department to review business owners "to confirm that the business owners…are suitable to produce or sell marijuana." Nev. Rev. Stat. § 453D.020(3)(b). The only theoretical injury a party could suffer for the Department's failure to implement that statute is an injury to public safety. The Unsuccessful Applicants could not have been injured for any violation of Nev. Rev. Stat. § 453D.200(6) that is not common to the public as a whole, and injury common to the public is not sufficient to create standing. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016).

Moreover, there is no evidence that the implementation of the 5% Rule affected the 2018 application process. As noted by Department witnesses, every entity that participated in the 2018 application process already held medical marijuana licenses, and thus had already had their ownership vetted by the Department. (33 AA8239 (testimony of Department Program Manager Steve Gilbert that "in the application process applicants in this last round were already current licensees, so the majority of the applicants that were applying were already vetted through the Department, because they had a valid cultivation or production or dispensary or retail store"); 35 AA8713-16 (Mr. Gilbert's testimony that during the 2018 applicant process, evaluators were able to compare ownership information listed in an application against the information the Department already had about an applicant's ownership information); 41 AA10171 (testimony from Ms. Contine that

the entities applying for licenses during the 2018 application already had licenses and thus had been through the background check process with the Department)[8].) Thus, any potential injury to Unsuccessful Applicants is not just speculative; it is entirely illusory. Accordingly, the preliminary injunction is based on a claim brought without standing and should therefore be dissolved.

D. The District Court Lacked Jurisdiction Over Respondents' Petition for Judicial Review Because They Failed to Identify All Affected Parties as Required by Nev. Rev. Stat. § 233B.130.

Among their many claims, the Respondents in this matter included a petition for judicial review. (29 AA7149-50.) Even assuming that Respondents could properly seek judicial review, however, they failed to identify all parties of record in their petition as required by Nev. Rev. Stat. § 233B.130, the provision of the Administrative Procedure Act ("APA") that provides for judicial review of an administrative decision.[9]

"Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the [L]egislature has made some statutory provision for judicial review." *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401,

[8] Ms. Contine additionally testified that pursuant to NAC 453D.255(2), if the Department determined "the public interest will be served by requiring any owner with an ownership interest of less than 5 percent in a marijuana establishment to comply with any provisions of this chapter concerning owners of marijuana establishments," the Department could exercise its discretion to conduct background checks on owners with less than a 5% interest in an applicant. (41 AA10066-67.)

[9] Nevada's APA is codified at Nev. Rev. Stat. § 233B.010 *et seq.*

775 P.2d 705, 706 (1989) (citation omitted). Accordingly, "[w]hen a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review, and [n]oncompliance with the requirements is grounds for dismissal." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (second alteration in original) (internal quotation omitted).

This Court explained in *Otto* that "pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement." *Otto*, 128 Nev. at 432-33, 282 P.3d at 725. Section 233B.130(2)(d) in turn requires that any petition for judicial review must be "filed within 30 days after service of the final decision of the agency." In the instant case, Respondents failed to strictly comply with Nev. Rev. Stat. § 233B.130(2)(a)'s requirement to name all the parties of record within the time mandated by § 233B.130(2)(d).

Here, Respondents filed their complaint on January 4, 2019. (2 AA343-59.) At the time Respondents filed their complaint, then-existing statutes pertaining to Department made certain records and files of the Department of Taxation concerning the administration and collection of certain taxes, fees and assessment confidential and privileged, including information pertaining to entities that participated in the

2018 application process. Thus, at the time Respondents filed their Complaint, they had arguably included all identifiable parties.

That changed, however, with the passage of Senate Bill 32 ("SB 32") during the 2019 legislative session. SB 32, which became effective on May 10, 2019, brought greater transparency to Nevada's marijuana industry by making more information publicly accessible, including information about the identities of applicants for licenses. (*See, e.g.*, 16 AA3981-85 (2018 retail marijuana store applications scores and rankings); 16 AA3989-97 (company names and scores for 2018 application period); 16 AA3999-4000 (list of owners, officers, and board members as of May 1, 2019).)

Thus, as of May 10, 2019, Respondents were able to access information about all of the applicants for the 2018 application process, all of whom would be affected by Respondents' efforts to undo the 2018 application process. Using May 10, 2019 as the new starting point, pursuant to Nev. Rev. Stat. § 233B.130(2)(a), the Respondents had 30 days—until June 10, 2019—to amend their complaint to include all parties affected by the Department's application process. Respondents did not amend their complaint until July 3, 2019 (20 AA4889-4906 (first amended complaint); *see also* 20 AA4907-24 (corrected first amended complaint)), but never named all the affected parties, *i.e.*, all the other applicants.

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The facts of this case are very similar to *Otto*. There, Washoe County timely filed a petition for judicial review from a decision of the State Board of Equalization. *Otto*, 128 Nev. at 429, 282 P.3d at 723. The respondents moved to dismiss Washoe County's petition on the grounds that it failed to comply with § 233B.130(2)(a)'s naming requirement. *Id.* The district court denied the motion but ordered Washoe County to file an amended petition for judicial review that complied with the APA within 30 days. *Id.* at 430, 282 P.3d at 723–24.

On appeal, the Court held the provisions of Nev. Rev. Stat. § 233B.130(2)—including the requirement to name all parties and to file a petition within 30 days—are mandatory. *Id.*, 128 Nev. at 432, 282 P.3d at 725 ("Nothing in the language of [Nev. Rev. Stat. § 233B.130(2)] suggests that its requirements are anything but mandatory and jurisdictional."); *accord K-Kel, Inc. v. State Dep't of Taxation*, 134 Nev. 78, 81, 412 P.3d 15, 17 (2018). Thus, "pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement." *Id.*, 128 Nev. at 432-33, 282 P.3d at 725. Because the original petition did not name all the parties of record to the administrative proceedings, the district court lacked jurisdiction to consider Washoe County's original petition for judicial review. *Id.* at 434, 282 P.3d at 726. Further, the Court held that the district court also lacked jurisdiction to consider the amended

petition for judicial review because it was ultimately filed outside of the statute's time limit. *Id.* at 434–35, 282 P.3d at 727.

The Court must reach the same conclusion here. Nev. Rev. Stat. § 233B.130(2) mandates how and when a party must name and identify all the parties to the application process. Respondents failed to comply with these requirements. Accordingly, consistent with *Otto*, this Court should find that Respondents' failure to comply with the strict requirements of the APA deprived the district court of jurisdiction.

E. The District Court Erred by Substituting the Department's Interpretation of Nev. Rev. Stat. § 453D.200(6) With Its Own.

As this Court explained in its decision in *NuLeaf*, a court must defer to an administrative agency's interpretation of a statute "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *NuLeaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 133, 414 P.3d 305, 308 (2018) (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev*., 122 Nev. 120, 126, 127 P.3d 528, 532 (2006)); *see also Desert Aire Wellness, LLC v. GB Scis., LLC*, 416 P.3d 1055 (Nev. 2018) (unpublished) (reversing the district court and finding, consistent with *NuLeaf* that "allowing the Department to issue a provisional registration certificate before an applicant receives local government approval does

not supersede local oversight of MMEs and does not conflict with the statute's plain language or the legislative intent").

In *NuLeaf*, the Court specifically recognized that it "***must afford great deference to the Department's interpretation of a statute that it is tasked with enforcing when the interpretation does not conflict with the plain language of the statute or legislative intent***." *NuLeaf*, 129 Nev. at 136, 414 P.3d at 311 (emphasis added) (citation omitted). Consistent with this guidance, the district court was required to give great deference to the Department's interpretation of Nev. Rev. Stat. § 453D.200(6) and its implementation of NAC 453D.255.

1. Nev. Rev. Stat. § 453D.200 Specifically Gives the Department Discretion to Implement the 5% Rule.

The voters' intent in passing Ballot Question 2—the ballot question which led to the legalization of recreational marijuana—was to protect the public's interest in "public health and safety" and to "better focus state and local law enforcement resources on crimes involving violence and personal property." Nev. Rev. Stat. § 453D.020(1). To effectuate to these important goals, Nev. Rev. Stat. § 453D.200(1) grants the Department the authority to "adopt all regulations necessary or convenient" to implement the State's recreational marijuana program, so long as the regulations "do not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable." Nev. Rev. Stat. § 453D.200(1). Accordingly, the Department

properly exercised its discretion in implementing NAC 453D.255(1), which provides that the background checks mandated by Nev. Rev. Stat. § 453D.200(6) would "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment." NAC 453D.255(1).

The Department's broad discretion to interpret the provisions of Chapter 453D is explicitly provided for in the very first provision of Nev. Rev. Stat. § 453D.200:

> Not later than January 1, 2018, the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter. The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable.

Nev. Rev. Stat. § 453D.200(1). Chapter 453D also provides a definition of "unreasonably impracticable":

> "Unreasonably impracticable" means that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.

Nev. Rev. Stat. § 453D.030(19). Under this plain language, the Department was empowered to interpret Nev. Rev. Stat. § 453D.200(6) and craft regulations which would permit it to carry out a primary intent of Chapter 453D: protecting public health and safety by taking the cultivation and sale of marijuana from the domain of

criminals and regulating it under a controlled system[10] without creating requirements that would effectively make the operation of a recreational dispensaries impossible.

And as several witnesses testified, requiring background checks on all owners, officers, and board members of an applicant—particularly when that applicant is owned by a publicly traded company—would be unreasonably impracticable and essentially impossible to comply with. (*See, e.g.*, 39 AA9588 (testimony of former Department Executive Director Jorge Pupo that conducting a background check of every single shareholder of a publicly traded company would be "a pretty impossible task"); 41 AA10137 (Ms. Contine's testimony that requiring background checks of every shareholder of a publicly traded company would be impossible and impractical); *see also* 42 AA10321 (Ms. Contine's testimony that requiring background checks of all shareholders—which change on a minute-by-minute basis—"would basically shut down the ability to operate"); 42 AA10357 (testimony of Robert Groesbeck that requiring background checks on the shareholders of publicly traded companies "would potentially have a chilling effect on the industry").) Thus, the Department's decision to limit the background checks required under Nev. Rev. Stat. § 453D.200(6) to the owners, officers, and board members of an applicant with an ownership interest of five percent or more was a reasonable way

[10] *See* Nev. Rev. Stat. § 453D.020(1) and (2).

to effect the purpose of making recreational marijuana safely available to the public without unduly burdening the Department.

Moreover, as discussed above, the Department's decision to implement the 5% Rule was not made in a vacuum. Aside from the fact that a similar provision had been in place for the medical marijuana program since 2014 (*see* NAC 453A.30), the 5% Rule was expressly recommended by the Governor's Task Force in 2017. (8 AA1989-90.) As explained in the appendices to the Task Force report, the guiding principles behind the 5% Rule were (1) to "[b]e responsive to the needs and issues of consumers, non-consumers, local governments, and the industry," and (2) to "[p]ropose efficient and effective regulation that is clear and reasonable and not unduly burdensome." (9 AA2085 (working group explanation of the 5% Rule recommendation).) Further, the working group that proposed the 5% Rule explained that the rule was intended:

> To allow companies that own marijuana establishment licenses in which there are multiple Owners that own less than 5%, in some cases far less, to be able to operate practically and efficiently. To allow companies that own marijuana establishment licenses to function based on their governing documents as companies are allowed to do in other industries.

(9 AA2085.) Thus, the 5% Rule was something that the Department implemented after considering its own responsibilities to implement the recreational marijuana program as well as the recommendation of stakeholders in the marijuana industry who believed that limiting background checks to only those officers, owners, and

board members who hold a five percent or more ownership interest was an effective way to respond to the needs of consumers and the industry.

2. The District Court Was Required to Afford the Department Great Deference in Interpreting the Provisions of NRS Chapter 453D.

An administrative agency charged with the duty of administering a statute "is entitled to receive deference from this court to its interpretations of the laws it administers so long as such interpretations are 'reasonable' and 'consistent with the legislative intent.'" *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996) (quoting *SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993)); *see also City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) (acknowledging that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference should be given to the agency's interpretation when it is within the language of the statute" (alterations in original; internal quotations omitted)); *NuLeaf*, 134 Nev. at 136, 414 P.3d at 311.

The judicial branch should refrain from stepping into the shoes of the State and making decisions for it. *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*, 129 Nev. 682, 686-87, 310 P.3d 583, 586-87 (2013). Indeed, the district court failed to consider that the Department has considerable discretion to interpret and implement the statutes governing the

issuance of registration certificates and licenses. *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1989) (city's interpretation of its own laws is "cloaked with a presumption of validity") (citations omitted). Because agencies such as the Department have discretion to construe the laws under which they operate, courts "are obliged to attach substantial weight to the agency's interpretation." *Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983).

Moreover, given that the statutory scheme at issue here is so new, the Department's discretion in interpreting and implementing the scheme is at its apex. Courts have recognized that deference to an agency is "heightened where . . . the regulations at issue represent the agency's initial attempt at interpreting and implementing a new regulatory concept." *Texaco, Inc. v. Dep't of Energy*, 663 F.2d 158, 165 (D.C. Cir. 1980) (quotation and internal punctuation omitted). This is so because administrative agencies like the Department are often presented with statutory schemes that contain gaps or contradictions. Thus, administrative agencies are vested with the authority to fill the gaps and reconcile statutory contradictions consistent with the power vested in them by the legislature to best carry out the statutory purpose. *See Atwell v. Merritt Sys. Prot. Bd.*, 670 F.2d 272, 282 (D.C. Cir. 1981) (an agency is empowered to reconcile arguably conflicting statutory provisions, and the court's role is limited to ensuring that the agency effectuated an appropriate harmonization within the bounds of its discretion).

Given this Court's guidance regarding deference to agencies, the extreme relief issued by the district court was improper. The purpose of a preliminary injunction is to "preserve the status quo ante litem pending a determination of the action on the merits." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (quotation omitted). Here, the district court's issuance of a preliminary injunction does not maintain the status quo; rather, it undermines the Department's interpretation and implementation of the statutory scheme. This was error, as a court cannot exercise its equitable powers in conflict with a statute. *State, Victims of Crime Fund v. Barry*, 106 Nev. 291, 292-93, 792 P.2d 26, 27-28 (1990) (a court cannot "grant a remedy which contradicts a statute").

Finally, although it was barely mentioned during the district court proceedings, it is important to note that no background checks were required as part of the 2018 application process because, pursuant to Nev. Rev. Stat. § 453D.210(2), the Department was only accepting applications for licenses for marijuana establishments "from persons holding a medical marijuana establishment registration certificate pursuant to chapter 453A of NRS."[11] Thus, for the 2018 application process, only existing establishments with ownership that had already been vetted and approved by the Department could apply. Accordingly, not only

[11] *See also* 33 AA8239; 35 AA8713-16; 41 AA10171 (testimony from Department witnesses regarding the fact that applicants in the 2018 application process had already undergone background checks).

were the district court's findings in the FFCL inconsistent with this Court's law regarding deference to administrative agencies, they were entirely irrelevant to the 2018 application process.

3. The District Court's Interpretation of Nev. Rev. Stat. § 453D.200(6) Could Lead to Absurd and Unreasonable Results.

Finally, the district court's determination that Nev. Rev. Stat. § 453D.200(6) must be strictly interpreted to require background checks of each owner of a publicly traded company would have absurd—and potentially devastating—consequences for the recreational marijuana industry. Statutes must be interpreted to avoid absurd or unreasonable results, even if this means rejecting a literal interpretation of the plain language a statute. *Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 604 (2015) (quoting *State v. Friend*, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002) ("[W]hen the 'literal, plain meaning interpretation' leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning"); *see also State v. White*, 130 Nev. 533, 536, 330 P.3d 482, 484 (2014) ("statutory construction should always avoid an absurd result") (quotation omitted).

Interpreted in its most literal sense, NRS 453D.200(6) would require a background check on every stockholder of every publicly held company every time a stock trades hands on the open market, a result even the district court rejected, suggesting instead that perhaps the Department could set a "record date" to conduct

all background checks on shareholders at a single point in time. (46 AA11367.) The statute, of course, provides for no such process.

Paradoxically, the district court rejected the Department's reasonable interpretation in favor of rigid adherence to the text (reading "each prospective owner" literally), while simultaneously creating its own interpretation (the Department could set a "record date" for owners) that is found nowhere in Ballot Question 2 or other relevant statutes.

The district court's interpretation of Nev. Rev. Stat. § 453D.200(6) would lead to absurd results that would affect the entire legal recreational marijuana industry. Taking the district court's interpretation to its logical end, any licenses transfers to publicly traded companies would have to be unwound—including transfers which were approved by the Department after the December 5, 2018 award of licenses to applicants—and effectively no public companies in the Nevada could own or operate any marijuana business.

Moreover, given that the ownership of publicly traded companies changes on a daily basis, the district court's proposed "fix" for background checks would be an exercise in futility. If the Department were to follow the "record date" approach suggested by the district court, the owners of a publicly traded company could be entirely different by the very next day. Thus, the Department could not actually fulfill its statutory mandate of protecting the industry (and, more importantly, the

public) from criminal influence, as potential nefarious players could simply avoid detection via options, warrants, or other indirect ownerships rights. This is the very definition of absurd. Thus, the injunction must be dissolved.

4. The District Court's Interpretation of Nev. Rev. Stat. § 453D.200(6) Thwarts the Public's Interest in Legal Access to Safe Recreational Marijuana.

This Court recognizes that a statute should be interpreted in light of the spirit of the law and public policy even if such an interpretation violates the plain language of the statute. If "a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so violates the spirit of the act." *Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 394, 373 P.3d 86, 87–88 (2016) (quotation omitted); *see also Desert Valley Water Co. v. State, Engineer*, 104 Nev. 718, 720, 766 P.2d 886, 886–87 (1988) ("The 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.").

In this instance the public has explicitly stated that, "[i]n the interest of public health and public safety, and in order to better focus state and local law enforcement resources on crimes involving violence and personal property, the People of the State of Nevada find and declare that the use of marijuana should be legal for persons 21 years of age or older, and its cultivation and sale should be regulated similar to other legal businesses." Nev. Rev. Stat. § 453D.020(1). The public has further stated that "[t]he People of the State of Nevada find and declare that the cultivation and sale of

marijuana should be taken from the domain of criminals and be regulated under a controlled system, where businesses will be taxed and the revenue will be dedicated to public education and the enforcement of the regulations of this chapter."

Owners with a less than 5% interest in a company are not making decisions on behalf of the company and do not have the ability to control the day-to-day business of the company. In effect, they have extremely minimal to no impact on public health and safety, and a background check on those owners is of no practical value. On the other hand, requiring background checks on those individuals would chill publicly traded companies from applying for licenses. As a result, some of the best qualified candidates that would best protect the public interest may not even apply for a license, and if they did, they could not reasonably obtain one. Such a reading—which subjects recreational establishments to onerous regulations that are not similar to those of other legal businesses—goes against the explicitly-stated spirit of the statute and public policy.

F. The District Court Failed to Articulate Any Irreparable Harm the Unsuccessful Applicants Would Suffer if the Injunction Were Denied.

"Injunctive relief is extraordinary relief, and the irreparable harm must be articulated in specific terms by the issuing order or be sufficiently apparent elsewhere in the record." *Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005) (citation omitted). An injunctive

order must be nullified "wherever the reasons for the injunction are not readily apparent elsewhere in the record, or appellate review is otherwise significantly impeded due to lack of a statement of reasons." *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 775–76 (1990).

Here, the district court's FFCL is strikingly devoid of any findings regarding *any harm* that *any party* would suffer by either the denial or issuance of an injunction. At most, it appears that the district court only considered whether the Department would be harmed as a result of the injunction. (23 AA5569, ¶ 89 (summarily concluding that the Department "stands to suffer no appreciable losses and will suffer only minimal harm as a result of an injunction").) What really matters for the purposes of injunctive relief, however, is whether "the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Dangberg Holdings Nevada, L.L.C. v. Douglas Cty. & its Bd. of Cty. Comm'rs*, 115 Nev. 129, 142 978 P.2d 311, 319 (1999) (citations omitted). And on that point the FFCL is nearly silent; other than a passing reference that a constitutional violation "may, by itself, be sufficient to constitute irreparable harm," (23 AA5564) the district court made no findings regarding the actual harm the Unsuccessful Applicants would suffer in the absence of injunctive relief. Given this Court's explicit guidance that such a finding must be specifically

articulated in the issuing order and or must otherwise be "readily apparent" in the record, the injunction must be nullified.

In fact, the injunction disproportionately harms GreenMart and other similarly situated Successful Applicants because, in practice, it enjoins GreenMart's ability to perfect its provisional licenses and open recreational marijuana dispensaries. Thus, GreenMart stands to lose all four licenses it was awarded by the Department. Respondents, by contrast, would suffer no harm if GreenMart were able to perfect its licenses. Some of the Unsuccessful Applicants asserted that they would be "harmed" by the loss of "market share." (*See, e.g.*, 29 AA7144.)[12] Such "harm," however, is not "(a) concrete and particularized; [or] (b) actual or imminent" as required to support a preliminary injunction. *Hajro v. U.S. Citizenship and Immig. Services*, 811 F.3d 1086, 1102 (9th Cir. 2016); *cf. Hauer v. BRDD of Indiana, Inc.*, 654 N.E.2d 316, 319 (Ind. Ct. App. 1995) (holding that parties lack standing to obtain preliminary injunction against licenses issued to a competitor, because the

[12] ("Plaintiffs further allege that pursuant to the implementation of the foregoing constitutionally-repugnant licensing process, the denial of their Applications for licensure, when coupled with the issuing of conditional licenses to their competitors pursuant to a constitutionally invalid and corrupt process infected by actual arbitrary, capricious or corrupt decision-making based upon administrative partiality or favoritism, has and will continue cause a diminution of Plaintiffs sales and market share values as a direct result of the conduct of the Department of Taxation issuing the conditional licenses and the business operations conducted pursuant thereto by the beneficiaries of that unconstitutional licensing process.'")

State's regulatory system does not exist to protect a competitor's market share or suppress competition).

Of course, because the district court never stated anywhere in the FFCL what "irreparable harm" the injunction would prevent against, it is impossible for this Court to discern if the loss of market share was the impetus for the district court's decision to issue the injunction. Moreover, no evidence of the loss of market share was ever even presented in the evidentiary hearing, leaving any such argument as conjectural, hypothetical, and insufficient to form irreparable harm. Thus, the district court erred in issuing the injunction.

G. The District Court Erred in Finding that GreenMart Did Not List Each of Its Prospective Owners in Its Applications to Open Recreational Marijuana Establishments Sufficient to Conduct the Background Checks Required by Nev. Rev. Stat. § 453D.200(6).

In its application, GreenMart properly listed its owners, all of whom had previously been vetted and approved by the Department. GreenMart is only affected by the district court's injunction because of the district court's improper decision to direct the Department to provide it with information only about the Successful Applicants' compliance with Nev. Rev. Stat. § 453D.200(6). By relying only on the emailed response of the Department's counsel regarding the various applicants, the district court allowed GreenMart to be subject to the Injunction without an explanation as to why. This was an abuse of discretion.

GreenMart is now subject to the injunction—and therefore stands to lose all four of the conditional licenses it was awarded—based solely on the district court's improper assumption that the phrase "prospective owner" in Nev. Rev. Stat. § 453D.200(6) includes not just the *actual* owners of a limited liability company, but also any indirect owners of a parent company of one of the owners of the applicant. Nev. Rev. Stat. § 453D.200 does not provide such a framework, and the injunction is completely devoid of any discussion of this issue.

H. The District Court Deprived GreenMart of Due Process by Ordering the Department to Provide Information Only About the Successful Applicants' Compliance with Nev. Rev. Stat. § 453D.200(6) But Not Requiring Similar Information About the Unsuccessful Applicants' Compliance.

Article 1, Section 8(2) of the Nevada Constitution guarantees that all persons are entitled to due process of law. As discussed above, at the close of the evidentiary hearing, the district court ordered the Department to provide it with information regarding which successful applicants complied with Nev. Rev. Stat. § 453D.200(6) but did not require the Department to provide the same information regarding the Unsuccessful Applicants. (46 AA11329-30.)

Due process and equity demand that if the district court considered the Successful Applicants' compliance with Nev. Rev. Stat. § 453D.200(6), it should have also considered the Unsuccessful Applicants' compliance with the same provision. This is particularly salient given that the applications of several

Respondents may suffer from the same perceived deficiency. The district court's failure to consider the Unsuccessful Applicants' compliance with Nev. Rev. Stat. § 453D.200(6) deprived GreenMart of due process, and arbitrarily and capriciously subjected GreenMart to the injunction.

Other than permitting the parties to file responses and/or objections to the court's consideration of the Department's August 22, 2019 email, the district court provided no opportunity for GreenMart or any of the other affected Successful Applicants to challenge the Department's suspect assessments. More importantly, by ordering the Department to only provide information about the Successful Applicants' compliance with Nev. Rev. Stat. § 453D.200(6), the district court consciously chose to limit the evidence it considered. This was an abuse of discretion. There was no valid basis for the district court to limit its consideration only to the Successful Applicants' compliance; if Nev. Rev. Stat. § 4453D.200(6) truly requires background checks of "each" owner, officer, and board member of a Successful Applicant, it also requires the same information of the Unsuccessful Applicants. Thus, the district court's failure to require and consider the same compliance information about all applicants in the 2018 application process requires dissolving the injunction.

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I. The Doctrine of Laches Warrants Dissolution of the Injunction.

"Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 124 Nev. 579, 598, 188 P .3d 1112, 1125 (2008) (quotation omitted); *see also Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992) (same). "Thus, laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another." *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). A post-hoc challenge, like the one brought below by the Unsuccessful Applicants, is barred by the doctrine of laches when the party inexcusably delayed bringing a challenge, constituting an acquiescence to the condition being challenged, resulting in prejudice to others. *Id.*

Here, the Unsuccessful Applicants voluntarily acquiesced to the process the Department established for the 2018 applications and the attendant regulations promulgated by the Department related to the application process. They did not object to the application process, nor did they file any sort of legal action to challenge the process. Instead, they eagerly submitted multiple applications, and then only objected and filed suits below when they learned they had not scored well enough to be awarded licenses. This sort of inexcusable delay has resulted in prejudice to GreenMart. GreenMart was awarded four conditional licenses during the 2018

application process. Since being awarded those four conditional licenses, GreenMart has invested substantial time and resources to perfect those licenses. Now, because of a combination of the Unsuccessful Applicants' sour-grapes litigation and the district court's improper issuance of a preliminary injunction, GreenMart stands to lose all the time, energy, and resources it invested in complying with the processes outlined by the Department for applying for and obtaining licensure. Accordingly, the doctrine of laches requires that the injunction be dissolved.

J. The Doctrine of Equitable Estoppel Barred the Unsuccessful Applicants from Challenging the 5% Rule.

"Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 853, 839 P.2d 606, 611 (1992) (citation omitted); *accord In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005). This Court has characterized equitable estoppel as consisting of four elements:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

Chequer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 999 (1982) (citations omitted); *accord In re Harrison*, 121 Nev. at 223, 112 P.3d at 1062.

Further, this Court "has noted that silence can raise an estoppel quite as effectively as can words." *Id.* (citation omitted). These four elements are present in the instant case; accordingly, the Unsuccessful Applicants should have been equitably estopped from challenging the Department's implementation of the 5% Rule.

At the time the Unsuccessful Applicants submitted their applications to the Department, they—along with every other applicant—were aware of the 5% Rule. Indeed, as discussed above, John Ritter was ***one of the sponsors of the 5% Rule***. (9 AA2084 (listing Mr. Ritter as a sponsor of the Task Force recommendation to adopt the 5% Rule).) Moreover, several of the Unsuccessful Applicants, including MM Development and Serenity Wellness, are public companies that rely upon the 5% Rule to currently operate. Even the Unsuccessful Applicants that are not public entities knew about the 5% Rule well before the application process began because every applicant during the 2018 application process had already been through the same background check process. (33 AA8239 (Mr. Gilbert's testimony that "in the application process applicants in this last round were already current licensees, so the majority of the applicants that were applying were already vetted through the Department, because they had a valid cultivation or production or dispensary or retail store").) The Unsuccessful Applicants, however, never raised this issue, much less challenged it, at the time of application submission, and none of them mention it in their complaints in this case.

The Department—which expended significant resources evaluating the applications—is now forced to defend a regulation that no one believed problematic until after the awards were announced. Both the applicants and the Department have expended considerable time, resources, and energy into furthering an industry the voters support, only to see delay caused by an "issue" that all were aware of at the time of submission. The complaints about the 5% Rule, however, are not genuine. Rather, they represent a meritless excuse to upset the process that did not benefit the Unsuccessful Applicants.

When GreenMart submitted its application, it complied with the 5% Rule as required by the regulations which had been recommended by the Task Force and adopted by the Department, as did every other applicant. Now, GreenMart stands to suffer huge financial losses because the Unsuccessful Applicants launched a post-hoc challenge to the 5% Rule. This sort of scenario is exactly why the doctrine of equitable estoppel exists—to "prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct." *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). Accordingly, the Unsuccessful Applicants should have been equitably estopped from challenging a regulation which they had already acquiesced to.

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V. CONCLUSION

The district court's entry of a preliminary injunction in this case was fundamentally flawed. The Unsuccessful Applicants lack standing to challenge the Department's denial of their applications, and even if they did have standing, their move to undo the entire application process is barred by the doctrine of laches. Moreover, the entry of the preliminary injunction was erroneous because the district court improperly substituted its judgment for that of the government agency tasked with implementing the recreational marijuana program and interpreted the statutes governing that process in a manner that conflicts with intent of the voters and thwarts the public interest. Accordingly, the injunction must be dissolved.

RESPECTFULLY SUBMITTED this the 23rd day of January, 2020.

/s/ Alina M Shell

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Opening Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Opening Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 12,650 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 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.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT GREENMART OF NEVADA NLV LLC'S OPENING BRIEF was filed electronically with the Nevada Supreme Court on the 23rd day of January, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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