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.

SUPREME COURT CASE NO.: 79668

DISTRICT COURT CASE NO.: A785818

APPELLANT LONE MOUNTAIN PARTNERS, LLC'S OPENING BRIEF

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I. NRAP 26.1 DISCLOSURE

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

Pursuant to NRAP 26.1, Appellant Lone Mountain Partners, LLC ("Lone Mountain") states that it is a Nevada limited liability company. No publicly held company nor any corporation owns 10% or more of Lone Mountain's membership interests.

In the District Court proceeding and the proceedings before this Court, the law firm H1 Law Group appears for Lone Mountain.

Dated this 6th day of February 2020.

H1 LAW GROUP

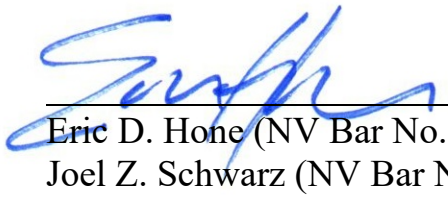

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Appellant Lone Mountain Partners, LLC ("Lone Mountain"), by and through its counsel, submits its Opening Brief.

II. JURISDICTIONAL STATEMENT

This appeal is from a Findings of Fact and Conclusions of Law Granting Preliminary Injunction ("FFCL"), notice of which was entered in the district court on August 28, 2019 (23 AA5544-5570). Lone Mountain Partners filed a timely notice of appeal on September 27, 2019. (26 AA006324-27).

This Court has jurisdiction over the matter pursuant to NRAP 3A(b)(3) which provides for immediate appeals of orders granting preliminary injunctions.

III. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(2) and (a)(8), because the appeal involves a ballot initiative as well as an administrative determination by the Department of Taxation ("Department"). The Court also retains jurisdiction pursuant to NRAP 17(a)(9) because the appeal is from a business court order. Finally, the Court retains jurisdiction pursuant to NRAP 17(a)(12) because this appeal concerns issues of statewide importance regarding Nevada's recreational marijuana industry.

IV. ISSUES PRESENTED FOR REVIEW

A. Did the district court err by enjoining the Department from moving forward with final licensure for certain conditional license holders after concluding that NRS 453D.200(6) required the Department to conduct background checks of prospective owners in the statutory 90-

day period between application submission and conditional licensure, even though the Department would have the opportunity to conduct additional background checks prior to final licensure.

B. Did the district court err in determining that the Department's adoption and application of the regulation in NAC 453D.255(1)—which provides that the requirements of NRS 453D.200(6) regarding background checks of "owners" will "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment"—was "arbitrary and capricious without any rational basis for the deviation" from the "mandatory requirement" of NRS 453D.200(6) to conduct a background check of "each prospective owner."

C. Did the district court err by determining which marijuana establishment conditional license holders to enjoin based on inadmissible hearsay statements that were given without oath or affirmation, which were not corroborated by other evidence, and which demonstrated clear bias against license holders that intervened in the litigations.

V. STATEMENT OF THE CASE

This case involves a challenge to the Nevada Department of Taxation (the "Department")'s implementation of Nevada's nascent recreational marijuana licensing laws codified in NRS Chapter 453D as well as the Department's promulgation of regulations under the same. Respondents are a collection of unsuccessful applicants for retail marijuana licenses that allege that the Department's denial of their applications during the highly competitive 2018 application period was the result of arbitrary and capricious actions and violated their constitutional rights.

Several similar lawsuits are pending in the Eighth Judicial District Court.

On May 13, 2019, Judge Gonzalez, Department XI, Eighth Judicial District Court, coordinated six of these cases, two of which were pending in her department and four of which were not, for purposes of hearing motions for a preliminary injunction filed by certain of the Plaintiffs.

Appellant Lone Mountain Partners, LLC ("Lone Mountain") was a successful applicant in 2018 and was a defendant-intervenor in three of the six cases coordinated by Judge Gonzalez for purposes of the preliminary injunction hearing.

After a nearly four-month evidentiary hearing, Judge Gonzalez entered a preliminary injunction based on her determination that the Department's adoption and application of the regulation in NAC 453D.255(1)—which provides that the requirements of NRS 453D regarding background checks of "owners" will "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment"—was "arbitrary and capricious without any rational basis for the deviation" from the "mandatory requirement" of NRS 453D.200(6) to conduct a background check of "each prospective owner." Findings of Fact and Conclusions of Law Granting Preliminary Injunction ("FFCL") (22 AA5277-5300).

Based on her conclusion that NAC 453D.255(1) conflicts with NRS 453D, Judge Gonzalez directed the Attorney General, which was representing the

Department, to re-review the 2018 applications of the successful applicants. Judge Gonzalez then enjoined the Department from conducting final inspections for any conditional license holders that the Department determined, on its re-review, may not have identified each prospective owner, officer, and board member at the time of application, notwithstanding that NAC 453D.255(1) provides that the background check and other requirements "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment." Multiple parties filed appeals.

VI. STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Nevada's Legalization and Regulation of Recreational Marijuana

1. Nevada Voters Adopt Ballot Question 2

During the November 2016 election, Nevada voters passed the Regulation and Taxation of Marijuana Act (the "Act" or "Ballot Question 2"). The Act legalized the purchase, possession, and consumption of recreational marijuana for adults 21 and older. *Id.*

Ballot Question 2 charged the Department with adopting 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." NRS

453D.200(1)(a)-(b).

2. Governor Appointed Task Force Considers and Deliberates Potential Regulations

On February 3, 2017, the Governor of the State of Nevada issued Executive Order 2017-02 "establishing a Task Force to deliberate on and make recommendations regarding policy, legal and procedural issues that must be considered to implement the Act." (46 AA11420). The Task Force was comprised of 19 members representing diverse interests and industries, and who met regularly over the course of ten weeks. (46 AA11418). Additionally, eight topic-focused working groups met weekly. (*Id.*) The Executive Director of the Department at the time, Deonne Contine, was appointed as Chair of the Task Force. (*Id.*)

All meetings of the Task Force and working groups were subject to Nevada's Open Meeting Law. "The Task Force endeavored to solicit public comment as part of its consideration of the policy, legal and procedural issues that need to be resolved to implement the Act." (46 AA11428).

One of the items discussed by the Task Force was the requirement under NRS 453D.200(6) for the Department to conduct background checks of marijuana establishment owners and board members. Specifically, NRS 453D.200(6) provides that "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." Considering the realities facing the Department in implementing such

a task, a 5 percent ownership threshold was proposed by the Task Force, under which only those owners holding 5 percent or more in a marijuana establishment would be subject to Department background checks. (47 AA11520-21).

The 5 percent ownership threshold for background checks was a Task Force recommendation that was discussed "extensively":

> There was discussion about the 5 percent both at the working group, the Task Force, the regulation process, and that discussion indicated that it was something that had been working for the industry. It wasn't unduly burdensome, and it was a way that we could move forward and implement the program.

(41 AA10168 at 5:22-6:13-18) (Testimony of Deonne Contine, Executive Director, Nevada Dep't of Taxation and Chair of Governor's Task Force). The Task Force specifically considered whether the Department had the authority to implement the 5 percent ownership threshold, and whether it would effectively protect public safety:

> We analyzed internally whether we could make that regulation in the recreational under the initiative and we considered whether we had the authority and then whether it would be unduly burdensome and whether using that 5 percent would also protect the public safety part.

(41 AA10168 at 7:9-13).

The Task Force recommended not to background check ownership interests of less than 5 percent in part because with a public company and market,

ownership changes all the time such that a vast number of people may come to own a very small portion of a company. (41 AA10172-73 at 10:21-11:3). The Task Force considered "conceptually the way markets work, the way that the trading happens there was a general understanding of that and the difficulty of obtaining accurate information in real time, and, again, balancing those burdens and the abilities to review . . . all of that with the recognition that we could still protect public health and safety…" (41 AA10174 at 12:15-21). Additionally, the Department believed that less than a 5 percent ownership interest would not lead to any control of business operations. (41 AA10227 at 65:18-21).

On May 30, 2017, the Task Force delivered its Final Report to the Governor, including the recommendation that "only Owners with 5% or more cumulatively" be required to undergo a background check by the Department. (47 AA11520-21).

3. The Department Duly Promulgates Regulations Pursuant to the Directive of Question 2

Based in part on the recommendations of the Task Force, the Department drafted proposed regulations and held public workshops from July 24, 2017 through July 27, 2017 on proposed permanent regulations. The draft permanent regulations were submitted to the Legislative Counsel Bureau on September 9, 2017 and assigned LCB File No. R092-17.

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. Among those regulations was the 5 percent ownership threshold for background checks, which was eventually codified at NAC 453D.255(1), which provides:

> **NAC 453D.255 Applicability of chapter to persons owning 5 percent interest or more in marijuana establishment; exception if public interest will be served. (NRS 453D.200)**
>
> 1. Except as otherwise required in subsection 2, the requirements of this chapter concerning owners of marijuana establishments only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment.
>
> 2. If, in the judgment of the Department, 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 will notify that owner and he or she must comply with those provisions.
>
> (Added to NAC by Dep't of Taxation by R092-17, eff. 2-27-2018)

B. 2018 Licensing Process and Resulting Litigations

On August 16, 2018, the Department issued a Notice of Intent to Accept Applications ("Notice") for 64 recreational marijuana retail store licenses, which are 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, 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. The Department was then required to go down the list and issue the highest scoring applicants the available licenses. *Id.*

Importantly, the Department's review, scoring, and ranking of applications had a strict, statutory time limit of 90 days. *See* NRS 453D.210(4).

The Department received over 460 applications for retail marijuana establishments during the 2018 application period. (47 AA11569-575). On December 5, 2018, the Department issued 61 recreational marijuana retail store conditional licenses and provided each applicant with written notice of either the grant or denial of their application. (6 AA1415). Appellant Lone Mountain was awarded 11 of these conditional licenses. (*See* 18 AA4352-58).

Within days of the Department's issuance of these conditional licenses, numerous unsuccessful applicants filed lawsuits challenging the Department's issuance of licenses. (1 AA1 - 2 AA375 (complaints)). The lawsuits challenged an exhaustive list of supposed infirmities with the licensing process. None of the complaints filed, however, challenged the Department enactment or application of the 5 percent ownership threshold under NAC 453D.255(1).

C. Evidentiary Hearing on Plaintiffs' Motions for Preliminary Injunction

On May 13, 2019, Judge Gonzalez, Department XI, Eighth Judicial District Court, coordinated six of these cases, two of which were pending in her department and four of which were not, for purposes of hearing motions for a preliminary injunction filed by certain of the Plaintiffs. (20 AA4938-40).

Although neither the plaintiff's complaints, nor their motions for preliminary injunction challenged the issue, during the evidentiary hearing on plaintiffs' motions for preliminary injunction, the district court began to question witnesses as to whether the 5 percent ownership threshold under NAC 453D.255(1) was consistent with Question 2's requirement that the Department conduct a background check of "each prospective owner." (*See* 37 AA9168; 39 AA9705).

4. District Court Directs Attorney General's Office to Determine Which Applicants "Completed the Application in Compliance with NRS 453D.200(6)"

On the final day of the four-month evidentiary hearing, after evidence had closed, the district court requested that the Attorney General's office provide a list of "[w]hich successful applicants completed the application in compliance with NRS 453D.200(6) at the time the application was filed in September 2018." (46 AA11406).

Six days later, on August 21, 2019, the Attorney General responded to the Court's request by sending an email to the district court's clerk placing each

successful applicant into one of three "tiers." (46 AA11406-07) ("Tier Classification Email" or "Email").

Tier 1 was defined to include all successful applicants that had not appeared or participated in the litigations, who the Department in reliance on these "applicants' attestations," and nothing else," determined complied with NRS 453D.200(6). (46 AA11406).

Tier 2 was defined as the successful applicants that have appeared in the litigations "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).

Tier 3 was defined as successful applicants 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 Lone Mountain Partners. The Attorney General offered differing explanations as to why certain applicants were placed in Tier 3, including that an applicant had been "acquired by a publicly traded company," or that it had a "subsidiary of a publicly traded company [that] owned a membership interested in the applicant." (46 AA11407). With respect to Lone Mountain Partners, the Attorney General stated that it "could not eliminate a question regarding the completeness of the applicant's identification of all of its owners."

(46 AA11407).

The Attorney General also explained that in creating its answer to the district court's question, "the Department" relied on "the applications themselves, testimony given at the hearing (without reference to issues of admissibility, which an affected party may raise), and information publicly available from a government website." (46 AA11407). Nowhere in the Attorney General's Email did the Attorney General identify who at the Department made such determination or engaged in a re-review of the 2018 applications. (*See id*.).

5. District Court Enjoins Only Applicants Identified by Department in August 2019 as Tier 3

Two days after the receipt of the Attorney General's Tier Classification Email, without any re-opening of evidence to test the purported factual assertions in the Email, or question the method and process by which the Attorney General determined the same, the district court filed a Findings of Fact and Conclusions of Law Granting Preliminary Injunction ("FFCL"). (22 AA5277-5300).

The FFCL granted a preliminary injunction based on the district court's determination that the Department's adoption and application of the regulation in NAC 453D.255(1)—which provides that the requirements of NRS 453D regarding background checks of "owners" of marijuana establishment license applicants will "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment"—was "arbitrary and capricious" and "without any

rational basis for the deviation" from the "mandatory requirement" of NRS 453D.200(6) to conduct a background check of "each prospective owner." (22 AA5291-92). Specifically, the district court reasoned:

> The DoT made the determination that it was not reasonable to require industry to provide every owner of a prospective licensee. The DOT's determination that only owners of a 5% or greater interest in the business were required to submit information on the application was not a permissible regulatory modification of [Ballot Question 2/NRS 453D.200(6)]. The determination violated Article 19, Section 3 of the Nevada Constitution. The determination was not based on a rational basis.

(22 AA5291 ¶ 42).

Judge Gonzalez then enjoined the Department from conducting final inspections for any conditional license holders that the Department determined, on its re-review, "did not provide the identification of each prospective owner, officer, and board member" at the time of application, notwithstanding that NAC 453D.255(1) provides that the background check and other requirements "only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment."

Based on this legal conclusion, the district court entered a preliminary injunction enjoining the Department "from conducting a final inspection of any of the conditional licenses issued in or about December 2018 who did not provide the identification of each prospective owner, officer and board member as required by

NRS 453D.200(6) pending a trial on the merits." (22 AA5300). The district court effectively denied the remainder of the motion for preliminary injunction.

Critically, the FFCL itself did not specify which conditional license holders would be subject to the injunction, but instead, referred to and incorporated the Attorney General's Tier Classification Email, which the FFCL refers to as a "post-hearing submission by the DoT." (22 AA5292 n.15). The injunction applied only to those successful applicants that the Attorney General classified, as of August 2019, as Tier 3 applicants; that is, those for whom the Attorney General "could not eliminate a question" as to whether the application, as submitted in September 2018, "complied" with NRS 453D.200(6) at the time of application submission.

VII. SUMMARY OF THE ARGUMENT

The district court's FFCL should be reversed because it is based on a clearly erroneous interpretation and application of NRS 453D.200(6). Despite the plain language of the statute putting the onus of conducting background checks on the Department, and despite the fact that the statue does not prescribe a time by which the background checks must be completed, the district court erroneously concluded that any applicant that did not submit a list of all of its owners, even those holding a negligible or nominal interest in an proposed establishment, failed to "comply" with NRS 453D.200(6) such that they could not move forward with final licensure. The district court's interpretation of NRS 453D.200(6) contradicts both the plain

language of the statute, as well as this Court's holding in *Nuleaf CLV Dispensary v. Nevada Dep't of Health and Hum. Svcs.*,[1] which held that requirements under Nevada's medical marijuana licensing regime had to be satisfied only prior to final licensure and that provisional licenses could issue to applicants that had not yet met all statutory pre-requisites for licensure.

Moreover, the FFCL should be reversed because it determined which successful applicants to enjoin purely based on hearsay evidence that was neither admitted during the evidentiary hearing, nor was submitted under affirmation or oath. What is worse, the hearsay evidence itself demonstrated that the Department's post hoc re-review of the applications favored winning applicants that did not intervene in the litigations and subjected to those applicants that did intervene to some unknowable, but exacting standard. For this reason too, the Court should reverse the district court's FFCL.

VIII. LEGAL ARGUMENT

For the purpose of judicial economy, Lone Mountain joins in the legal arguments raised in Nevada Organic Remedies, LLC's Opening Brief, filed on January 13, 2020, and those raised in GreenMart of Nevada NLV LLC's Opening Brief, filed on January 23, 2020. In addition, Lone Mountain sets forth the following arguments.

[1] 134 Nev. 129, 414 P.3d 305 (2018).

A. Standard of Review

A district court's grant of a preliminary injunction is subject to reversal where the district court abuses its discretion or applies an erroneous legal standard. *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). "Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence, but questions of law are reviewed de novo." *Id.* Statutory interpretation is a question of law which this Court reviews *de novo.* *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006).

Here, the Court should reverse the FFCL because the district court applied an erroneous legal standard in its interpretation and application of NRS 453D.200(6). Additionally, reversal is appropriate because the several of the district court's factual findings were based wholly on unsubstantiated hearsay from a witness that did not testify nor provide an oath or affirmation.

B. The District Court's Construction and Application of NRS 453D.200(6) Was Clearly Erroneous

Reversal of the district court's FFCL is warranted because (1) the district court's interpretation and application of NRS 453D.200(6) contradicts the plain language of the statute and this Court's guidance in *Nuleaf*; (2) the district court failed to offer the Department deference to interpret and apply a statutory scheme

for which it was responsible for implementing; and (3) the district court's interpretation of NRS 453D.200(6) leads to an absurd result against public policy.

6. The Preliminary Injunction Contradicts the Plain Language of NRS 453D.200(6) and This Court's Decision in *Nuleaf*

The district court's preliminary injunction should be reversed because it is based on an erroneous interpretation of NRS 453D.200(6)'s background check requirement.

Again, NRS 453D.200(6) provides that provides that "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." However, nothing within this provision requires that the Department conduct a background check of each prospective owner, officer and board member prior to an award of a *conditional* license, or *at the time of application submission*, which was assumed by the district court's inquiry to the Attorney General. Indeed, because the district court only inquired from the Attorney General as to "Which successful applicants completed the application in compliance with NRS 453D.200(6) ***at the time the application was filed in September 2018***," the district court had already embedded in her question an assumption that the background checks were required prior to an award of a conditional license. (46 AA11406) (emphasis added). Yet, no such requirement exists under the plain language of the statute. Moreover, the exact arguments adopted by the District Court's FFCL with respect to finding

"complete" applications at the time of submission were rejected by this Court in *Nuleaf CLV Dispensary v. Nevada Dep't of Health and Hum. Svcs.*, 134 Nev. 129, 414 P.3d 305 (2018), in the context of Nevada's 2014 medical marijuana licensing decisions. Indeed, the similarities between this case and *Nuleaf* are stark.

In the 2014 medical marijuana licensing rounds, the losing applicants similarly sued the State licensing body, and similarly argued that winning applicants that had not complied with all statutory license requirements by the date of provisional licensure should be stripped of their licenses. The 2014 medical licensing was similar to the 2018 retail marijuana licensing in numerous respects; both, by statute, were required to have a 90-day application review period followed by a ranking of applications and an award of provisional licenses to the highest-ranking applicants subject to the local population caps. *Compare Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 130-31, 414 P.3d 305, 307 (2018) (citing and discussing NRS 453A.322) *with* NRS 453D.210 (providing for similar 90-day application review period for retail licenses). After provisional licenses were awarded, conditional licenses holders were subject to additional requirements prior to final licensure.

In *Nuleaf*, losing applicants argued they should be entitled to licenses obtained by winning applicants that had failed to provide certification the applicant

complied with local land use and zoning restrictions at the time the provisional certificates were awarded. *Nuleaf*, 134 Nev. at 135-36, 414 P.3d at 310-311. This Court disagreed, holding that the statutory requirements for medical establishment licenses did not have to be satisfied at the time of *provisional licensure*, but instead, had to be satisfied only by the time of *final licensure*. *Id.*

The statute at issue in *Nuleaf* required submission and proof of local government zoning and land use compliance as pre-requisite to licensure. *See* NRS 453A.322(3)(a)(5). Finding that the language of the statute and related statutes to be "ambiguous as to whether the Department can issue a certificate for an applicant who fails to satisfy" this requirement, *id.* at 309, this Court concluded that the requirement could be met *after* provisional licensure and was not a prerequisite to obtaining a provisional license. *Nuleaf*, 134 Nev. at 135-36, 414 P.3d at 310-311. In so holding, this Court reasoned that "the issuance of a medical marijuana establishment registration certificate . . . is provisional and not an approval to begin operations as a medical marijuana establishment until" other requirements have been satisfied, such as local zoning approval and the procurement of a business license. *Id.*

The Court also explained that the statutory 90-day deadline for issuing provisional certificates further compelled the conclusion that statutory requirements for licensure did not all need to be completed by the 90-day deadline,

but instead, merely needed to be completed by the time of final licensure. *Id.*

Just as in *Nuleaf*, statutory requirements for licensure should be required only by the time of final licensure, not by the time a provisional license is issued. That is especially true where here, just as in *Nuleaf*, the Department was subject to a statutory 90-day deadline within which to review, score and rank 462 applications, each totaling hundreds of pages. *See* NRS 453D.210(4) (requiring the Department to approve or reject applications within 90 days from receipt).

Accordingly, the district court's direction to the Attorney General for confirmation of applicants that had submitted applications "in compliance with NRS 453D.200(6) at the time the application was submitted in 2018" was clearly erroneous, as "applications" could never be in or out of "compliance" with NRS 453D.200(6), a statute that places the background check burden on the Department, not the applicants. Furthermore, given that the Department was statutorily bound to issue conditional licenses within 90 days of receipt of the applications, the statute should not be interpreted to require the Department to complete all background checks within the same 90 days period—indeed, nothing in the statute requires that the background checks be conducted in this 90 day time frame when the Department has numerous other and competing statutory duties.

The district court's conclusion that applications had to somehow "comply" with NRS 453D.200(6) at the time of application submission was in error, is not

supported by the plain text of the statute, and directly contradicts this Court's holding in *Nuleaf,* which permits statutory requirements for licensure to be met between a provisional license award and a final license. Accordingly, the district court's FFCL and preliminary injunction were clearly erroneous, and this Court should reverse the district court's FFCL.

7. The District Court Improperly Substituted Its Judgment for That of the Division in Interpreting NRS 453D.200(6)

Additionally, the district court erred in concluding that NAC 453D.255's 5 percent ownership threshold for background checks was arbitrary and capricious and beyond the Department's statutory authority to promulgate regulations under NRS Chapter 453D.

Nuleaf directly supports the propriety of the Department's enactment of the 5 percent regulation. In *Nuleaf*, this Court held that Nevada's Department of Health and Human Services was entitled to deference in its interpretation and execution of its discretionary functions, and to its determination that local zoning approvals was not a pre-requisite to a provisional license under NRS Chapter 453A, despite statutory language suggesting otherwise. *NuLeaf*, 414 P.3d at 311 (holding that "we 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"). Based on this deference, the Court reversed the district court's issuance of an injunction directing the Department to

revoke a license and award it to a different applicant, acknowledging that "[c]ourts ... must respect the judgment of the agency empowered to apply the law to varying fact patterns, even if the issue with nearly equal reason [might] be resolved one way rather than another." *Id.* (*quoting Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 841-42 n.15, 59 P.3d 474, 477 n.15 (2002)).

"An agency's actions are arbitrary and capricious when there is an apparent absence of any grounds or reasons for the decision. 'We did it just because we did it.'" *Tighe v. Von Goerken*, 108 Nev. 440, 442-44, 833 P.2d 1135, 1136-37 (1992). Thus, if an agency can articulate a justifiable reason for its action, it cannot be said to have acted in an arbitrary or capricious manner. *See id.* Moreover, even if there is conflicting evidence as to the rationale or appropriateness of an agency decision, "conflicting evidence does not compel interference with the [agency's] decision so long as the decision was supported by substantial evidence." *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Erdun v. Bally Techs.*, No. 68317, 2017 WL 417182, at *1 (Nev. App. Jan. 18, 2017) (emphasis added) (internal quotations omitted).

Here, and as several witnesses at the preliminary injunction hearing 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 an unreasonably impracticable and essentially impossible requirement with which to comply. (41 AA10137) (Deonne Contine's testimony that requiring background checks of every shareholder of a publicly traded company would be impractical if not impossible); *see also* (42 AA10321) (Ms. Contine's testimony that requiring background checks of all shareholders—which change on 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 decision to limit the background checks required under NRS 453D.200(6) to the owners of an applicant with an ownership interest of five percent or more was entirely consistent with the statute.

Furthermore, the Department's interpretation of the term "each owner," which is entitled to deference, is further bolstered by Nevada case law which holds that "the word 'every' is not always synonymous with the word 'each.'" *See State v. Nevada N. Ry. Co.*, 48 Nev. 436, 233 P. 531, 532 (1925). The district court erred by substituting its judgment for the Department and this Court should therefore reverse the FFCL.

8. The District Court's Interpretation of NRS 453D.200(6) Is Against Public Policy and Leads to an Absurd Result

Reversal is appropriate also because the district court's interpretation of NRS 453D.200(6) leads to an absurd result where public companies, having hundreds if not thousands of owners, would be effectively prohibited from participating in Nevada's marijuana industry because the immense time and cost required to conduct background checks of owners holding nominal shares.

Indeed, the district court's conclusion that Ballot Question 2 requires the Department to background check every single owner of a marijuana establishment, even an owner holding less than 1 percent of a company, effectively prohibits public companies, and larger companies generally, from participating in Nevada's cannabis market. Yet this makes little sense as a matter of policy given that publicly traded companies are subject to far greater regulation and more stringent disclosure requirements than are private companies and corporations.

A court should not adopt a statutory construction that leads to an absurd result, or a construction that prohibits public companies from participating in regulated activities, absent a clear indication such prohibition was specifically intended by the law. *See Smith v. Kisorin U.S.S., Inc.*, 127 Nev. 444, 449-50, 254 P.3d 636, 640 (2011). In *Kisorin*, this Court interpreted a Nevada statute relating to individuals entitled to dissenters' rights notices from corporations. In concluding that all a corporation's beneficial owners were not entitled to notice,

the Court reasoned that because "publicly traded companies do not have contact information for all beneficial owners" that "the Legislature, in NRS 92A.410 and NRS 92A.430, could not have intended to require corporations to send notices to stockholders for whom they have no information." 254 P.3d at 640. "We reach this conclusion because of one very important reason—corporations do not have the right to access all beneficial owners' information. If we determined that beneficial owners must be notified, corporations would be unable to comply with the law. The Legislature could not have intended this absurd result." *Id.*

As previously explained, 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 requirement with which to comply. Thus, the Department decision to limit the background checks required under NRS 453D.200(6) to the owners of an applicant with an ownership interest of five percent or more was entirely consistent with the statute and with this Court's holding in *Smith v. Kisorin U.S.S., Inc.*, 127 Nev. 444, 449-50, 254 P.3d 636, 640 (2011). For these reasons as well, the Court should reverse the district court's FFCL.

C. The District Court Abused its Discretion by Basing the Preliminary Injunction on Unauthenticated Hearsay Submitted After the Close of Evidence

The district court determined which parties would be subject to injunction

based solely on the Email sent by Deputy Attorney General Steve Shevorski to the district court's clerk after the close of evidence. This Email purported to determine which parties the AG's office could "not eliminate a question" as to the party's ownership disclosures.

Hearsay is defined as "a statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. The statement may be either oral or written. NRS 51.045. Hearsay evidence is inadmissible, subject to several exceptions not at issue here. *See* NRS 51.065(1). Introduction of hearsay evidence may amount to harmless error where other evidence already established the same facts. *See Deutscher v. State*, 95 Nev. 669, 685, 601 P.2d 407, 418 (1979). However, where there is an absence of physical evidence or witness testimony to corroborate the truth of a hearsay statement, reversal of the lower court is appropriate where admittance or reliance on hearsay evidence prejudices the opponent. *See Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993). Furthermore, Nevada statute requires that "[b]efore testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation . . . ." NRS 50.035(1).

Here, the district court improperly assumed the truth of the contents of the Email and incorporated them into the FFCL despite that (1) the Email was an out of court statement offered to prove the truth of the matter asserted and was therefore inadmissible hearsay; (2) Steve Shevorski submitted the Email without

oath or affirmation; and (3) neither Mr. Shevorski, nor anyone representing the Department, was subject to cross-examination with respect to the purported "facts" contained in the Email, or how the witness came to learn of such facts. Additionally, this was not a situation in which the district court's reliance on hearsay amounted to harmless error. No other evidence in the record supports the tier categorization offered by Mr. Shevorski's Email, and none of the former or current Department employees that testified at the hearing, of which there were several, testified consistently with the facts asserted in Mr. Shevorski's Email.

Furthermore, the Email itself demonstrates that the Department treated non-intervenors differently from intervening parties when the Department re-reviewed applications for "compliance" with NRS 453D.200(6) as directed by the district court. Specifically, Mr. Shevorski's Email makes clear that while the Department accepted as true the representations made in the applications of non-intervening conditional license holders, with respect to the conditional license holders that intervened in the action, it considered materials extraneous to the applications themselves, such as witness testimony and "information publicly available from a government website." (46 AA11407).

With respect to Lone Mountain specifically, Mr. Shevorski's Email stated that the Department "could not eliminate a question regarding the completeness of the applicant's identification of all of its owners" and could not determine if it was

"owned by the individual members listed [in its application]." (46 AA11407). However, with respect to the non-intervening license holders, Mr. Shevorski made clear that the Department "[a]ccepted as truthful these applicants' attestations regarding who their owners, officer and board members were at the time of the application." (46 AA11406).

Thus, in its August 2019 court-directed re-review of the applications, the Department accepted as true representations in non-intervening licenses holders' applications, but attempted to verify, and eliminate any questions or doubt, with respect to representations made by those license holders that intervened in the litigations. There was no rational basis for the Department's treatment of intervening license holders differently than non-intervening license holders, and the re-review was therefore arbitrary and capricious and the FFCL based on the same should be reversed.

IX. CONCLUSION

The FFCL should be reversed because it is based on an erroneous interpretation and application of NRS 453D.200(6). The district court's interpretation of NRS 453D.200(6) contradicts the plain language of the statute, as well as this Court's analysis in *Nuleaf*. Moreover, the district court's interpretation fails to provide adequate deference to the Department and leads to the absurd result that publicly traded companies, which are subject to greater regulation, are

effectively prohibited from participating in Nevada's marijuana industry. Finally, the FFCL should be reversed because it determines which conditional licenses holders are enjoined from operation based solely only on unauthenticated hearsay submitted to the court via email after the close of evidence that demonstrates a clear, and unjustifiable, bias against conditional license holders that intervened in the litigations below.

X. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,338 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 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 6th day of February 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February 2020, I submitted the foregoing APPELLANT LONE MOUNTAIN PARTNERS, LLC'S OPENING BRIEF for filing and service via the Court's eFlex electronic filing system.

Bobbye Donaldson, an employee of H1 Law Group