**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 MOUNTANT PARTNERS, LLC,

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.: A-19-786962-B



# RESPONDENTS' ANSWERING BRIEF

Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
John A. Hunt, Esq. (NSBN 1888)
**CLARK HILL, PLLC**
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
ph. (702) 862-8300; fax (702) 862-8400
Email: dgentile@clarkhill.com
Email: rmiller@clarkhill.com
Email: jhunt@clarkhill.com
Attorneys for Respondents,
(**less** the State of Nevada, Department of Taxation)

## NRAP 26.1 DISCLOSURE

This NRAP 26.1 Disclosure is made in connection with the following Respondents: SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company, TGIG, LLC, a Nevada limited liability company, NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company, NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company, TRYKE COMPANIES SO NV, LLC a Nevada limited liability company, TRYKE COMPANIES RENO, LLC, a Nevada limited liability company, GBS NEVADA PARTNERS, LLC, a Nevada limited liability company, FIDELIS HOLDINGS, LLC, a Nevada limited liability company, GRAVITAS NEVADA, LLC, a Nevada limited liability company, NEVADA PURE, LLC, a Nevada limited liability company, MEDIFARM, LLC, a Nevada limited liability company; and MEDIFARM, IV LLC, a Nevada limited liability company (collectively the "Serenity Applicants").

The undersigned attorney of record certifies that the following are person and entities as described in NRAP 26.1(a). These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.[1]

1. SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company is owned 100% by Alternative Solutions, LLC, which is owned 100% by CLS Holdings USA, Inc., a public company.

2. TGIG, LLC, a Nevada limited liability company is 63.12% owned by Core TGLV, Kouretas Capital LLC is 16.88% owner of TGIG, LLC, and Kouretas Management LLC is 20% owner of TGIG.

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[1]PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company ("PWC"), is listed in the caption as a Respondent. However, at a hearing on July 2, 2019, in case number A-19-786962-B, in connection with the underlying Plaintiffs' motion for leave to file a first amended complaint, the district court granted PWC leave to withdraw as a Plaintiff.

3. NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company is 100% owned by Nuleaf, Inc. Nuleaf Capital Investors Group, LLC is 55% owner of Nuleaf, Inc. Nuleaf Operators, LLC is 45% owner of Nuleaf, Inc.

4. NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

5. TRYKE COMPANIES SO NV, LLC a Nevada limited liability company is 100% owned by Seacoast Investments Fund II, LLC. Seacoast Fund II, LLC is the 100% owner of Seacoast Investments Fund II, LLC. TH Fund II, LLC is the 100% owner of Seacoast Fund II, LLC. Thomas F Ryan 2008 Revocable Trust is 84% owner of TH Fund II, LLC. The Ryan Family 2011 Irrevocable Trust is 15% owner of TH Fund II, LLC. Thomas F. Ryan Qualified Annuity Trust #1 is 1% owner of TH Fund II, LLC.

6. TRYKE COMPANIES RENO, LLC, a Nevada limited liability company is 100% owned by Seacoast Investments Fund II, LLC. Seacoast Fund II, LLC is the 100% owner of Seacoast Investments Fund II, LLC. TH Fund II, LLC is the 100% owner of Seacoast Fund II, LLC. Thomas F Ryan 2008 Revocable Trust is 84% owner of TH Fund II, LLC. The Ryan Family 2011 Irrevocable Trust is 15% owner of TH Fund II, LLC. Thomas F. Ryan Qualified Annuity Trust #1 is 1% owner of TH Fund II, LLC.

7. GBS NEVADA PARTNERS, LLC, a Nevada limited liability company is 15.450% owned by MMJ Investment Facility, LLC, 24.850% owned by Hammermeister NV, LLC, 24.850% owned by The Meservey Family Trust, 24.850% owned by Greenacre Trust, and 10% owned by 483 Management, LLC.

8. FIDELIS HOLDINGS, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

9. GRAVITAS NEVADA, LLC, a Nevada limited liability company is 60% owned by Green Ache'rs Consulting Limits and 40% owned by Verdant Nevada LLC.

10. NEVADA PURE, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

11. MEDIFARM, LLC, a Nevada limited liability company is 100% owned by Terra Tech Corp.

12. MEDIFARM, IV LLC, a Nevada limited liability company is 100% owned by Terra Tech Corp.

The following law firms have appeared for the Serenity Applicants at the district court: Gentile, Cristalli, Miller, Armeni & Savarese, PLLC, and Clark Hill, PLLC.

The following attorneys have appeared for the Serenity Applicants at the district court: Dominic Gentile, Esq., Michael Cristalli, Esq., Ross Miller, Esq., Vincent Savarese, III, and John A. Hunt, Esq.

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The following law firms have or are expected to appear for the Serenity Applicants in this matter before this Court: Clark Hill, PLLC.

The following attorneys have or are expected to appear for the Serenity Applicants in this matter before this Court: Dominic Gentile, Esq., Ross Miller, Esq., and John A. Hunt, Esq.

Respectfully submitted this 12th day of February, 2020.

**CLARK HILL, PLLC**

By: /s/ John A. Hunt, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
John A. Hunt, Esq. (NSBN 1888)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
ph. (702) 862-8300; fax (702) 862-8400
Email: dgentile@clarkhill.com
Email: rmiller@clarkhill.com
Email: jhunt@clarkhill.com
Attorneys for Respondents (less the State of Nevada, Department of Taxation)

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## I.
## SUMMARY OF THE ARGUMENT

The initiative to legalize recreation marijuana, Ballot Question 2 ("BQ2") was enacted by the Nevada Legislature and codified at NRS 453D. BQ2 specifically identified regulatory and public safety concerns and one of the mechanisms to address those safety concerns was the mandatory language set forth in NRS 453D.200(6), which requires the State of Nevada, Department of Taxation ("DoT") to conduct a background check "of each prospective owner, officer, and board member of a marijuana establishment license applicant." Instead of carrying out the voters' mandate, the DoT adopted a regulation limiting the background check to any owner with a five percent or greater interest.

The district court properly issued the preliminary injunction because the DoT's deviation from the voters' mandate was not entitled to deference. District courts do not defer to an agency's interpretation that conflicts with an existing statutory provision nor can an administrative regulation modify or contravene an existing statute. The DoT's regulation did just that – it modified the statute and voters' mandate requiring a background check "of each prospective owner, officer, and board member of a marijuana establishment license applicant." The DoT's modification improperly subverted the mandatory language of NRS 453D.200(6), which addressed the voters' regulatory and public safety concerns.

The district court properly applied the preliminary injunction to Nevada Organic Remedies, LLC ("NOR"). By its own admissions, NOR did not identify every prospective owner, officer, and board member of a marijuana establishment license applicant on its application, thus NOR prevented the DoT from complying with the mandatory language set forth in NRS 453D.200(6). Further, the preliminary injunction was appropriately applied to several other applicants who the DoT concluded similarly did not identify each prospective owner, officer and board member on their applications as required by NRS 453D.200(6). The preliminary injunction was also properly not applied to those applicants who complied with NRS 453D.200(6).

The district court further considered that Serenity Applicants had standing to challenge the DoT's unconstitutional modification of the background check requirement. Because legislative intent reigned in the DoT's discretion regarding reviewing and approving applications, the Serenity Applicants had a protectable property interest and a liberty interest in each of their respective applied-for licenses. The principle of equitable estoppel is not applicable because at the time of application submission, Serenity Applicants would not have contemporaneously known that the DoT would fail to comply with NRS Chapter 453D. The Serenity Applicants could not challenge the DoT's regulation until *after* it failed to comply with the mandatory language set forth in NRS 453D.200(6).

Finally, the district court clearly delineated the irreparable harm the Serenity Applicants would suffer absent a preliminary injunction. The district court found that the Serenity Applicants were subject to numerous statutory and constitutional violations and because there was a limited number of available licenses, injunctive relief was necessary to permit the Serenity Applicants to obtain a license if ultimately successful in the underlying litigation.

## II.
## ARGUMENT

### 1. Contrary to NOR's contentions, the district court properly found the Serenity Applicants and other Plaintiffs at the district court are likely to succeed on the merits.

The district court on August 23, 2019, issued a preliminary injunction with the filing of its *Findings of Fact and Conclusions of Law Granting Preliminary Injunction* ("Preliminary Injunction Order" or "FFCL"). 22 AA 5277-5300. It runs for twenty-four (24) pages and includes at least ninety-one (91) numbered paragraphs of findings of fact and conclusions of law. Id. On the issue of success upon the merits and balance of equities, the district court found, in part:

> 86. As Plaintiffs have shown that the DoT clearly violated NRS Chapter 453D, the claims for declaratory relief, petition for writ of prohibition, and any other related claims is likely to succeed on the merits.
>
> 87. The balance of equites weights in favor of Plaintiffs.

See FFCL, 22 AA 5298:23-27, ¶¶ 86-87.

Notwithstanding the district court's finding, NOR begins its argument with the contention the Serenity Applicants (and other Plaintiffs at the district court) failed to meet their burden they are likely to succeed on the merits. See Opening Brief, pg. 23. In addressing this contention, NOR goes about arguing the district court improperly addressed certain statutory and regulatory provisions. Id., pgs. 23-37. As more fully addressed below, the district court properly found the Plaintiffs below are likely to succeed on the merits.

**2. NOR's "great deference" argument is without merit.**

The first sub-part of NOR's success upon the merits section of its Opening Brief argues the DoT is entitled to great deference in interpreting NRS Chapter 453D. See Opening Brief, pgs. 23-26.[2] As best is understood, NOR takes issue with the district court's finding the adoption of NAC 453D.255(1), as it applies to the application process, is an unconstitutional modification of BQ2. See FFCL, 22 AA 5291:17-18, at ¶ 44.[3] NOR's contention also apparently takes issue with the

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[2] While this section of NOR's brief is nearly five (5) pages in length, it only has, at the top of page 25, one (1) citation to the record. See NRAP 28(a)(10)(A) and/or NRAP 28(e)(1).

[3] The district court's FFCL in fn. 13 also noted "[f]or administrative and regulatory proceedings other than the application, the limitation of 5% or greater ownership appears within the DoT's discretion." 22 AA 5291:25-26, fn. 13.

district court's finding "the failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process[][4][and] [t]he DoT's decision to adopt regulations in direct violation of BQ2's mandatory application requirements is violative of Article 19, Section 2(3) of the Nevada Constitution." See FFCL, 22 AA 5291:18-21, at ¶ 44.

The district court's FFCL addresses various levels of discretion and deference to be applied:

> The initiative to legalize recreational marijuana, Ballot Question 2 ("BQ2"), went to the voters in 2016. The language of BQ2 is independent of any regulations that were adopted by the DoT. The Court must balance the mandatory provisions of BQ2 (which the DoT did not have discretion to modify);[5] those provisions with which the DoT was granted some discretion in implementation;[6] and the

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[4][Original fn. 14] That provision states:

> 6. The Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant.

[5] [Original fn. 4] Article 19, Section 2(3) provides the touchstone for the mandatory provisions:

> . . . . An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.

[6] [Original fn. 5] NRS 453D.200(1) required the adoption of regulations for the licensure and oversight of recreational marijuana cultivation, manufacturing/production, sales and distribution, but provides the DoT discretion in exactly what those regulations would include.

> . . . 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. The regulations shall include:

> inherent discretion of an administrative agency to implement regulations to carry out its statutory duties. The Court must give great deference to those activities that fall within the discretionary functions of the agency. Deference is not given where the actions of the DoT were in violation of BQ2 or were arbitrary and capricious.

See FFCL, 22 AA 5281:1-8.

As to BQ2, NRS 453D.200(6), and NAC 453D.255(1) the district court's findings of fact as contained in its FFCL provide, in part, as follows:

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> (a) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment;
> (b) Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment;
> (c) Requirements for the security of marijuana establishments;
> (d) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under 21 years of age;
> (e) Requirements for the packaging of marijuana and marijuana products, including requirements for child-resistant packaging;
> (f) Requirements for the testing and labeling of marijuana and marijuana products sold by marijuana establishments including a numerical indication of potency based on the ratio of THC to the weight of a product intended for oral consumption;
> (g) Requirements for record keeping by marijuana establishments;
> (h) Reasonable restrictions on signage, marketing, display, and advertising;
> (i) Procedures for the collection of taxes, fees, and penalties imposed by this chapter;
> (j) Procedures and requirements to enable the transfer of a license for a marijuana establishment to another qualified person and to enable a licensee to move the location of its establishment to another suitable location;
> (k) Procedures and requirements to enable a dual licensee to operate medical marijuana establishments and
> marijuana establishments at the same location;
> (1) Procedures to establish the fair market value at wholesale of marijuana; and

36. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria set forth therein and the provisions of the Ballot Initiative and the enabling statute.

37. When the DoT received applications, it undertook no effort to determine if the applications were in fact "complete and in compliance."

38. In evaluating whether an application was "complete and in compliance" the DoT made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).

39. For purposes of grading the applicant's organizational structure and diversity, if an applicant's disclosure in its application of its owners, officers, and board members did not match the DoT's own records, the DoT did not penalize the applicant. Rather the DoT permitted the grading, and in some cases, awarded a conditional license to an applicant under such circumstances, and dealt with the issue by simply informing the winning applicant that its application would have to be brought into conformity with DoT records.

40. The DoT created a Regulation that modified the mandatory BQ2 provision "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant" and determined it would only require information on the application from persons "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." NAC 453D.255(1).

41. NRS 453D.200(6) provides that "[t]he DoT shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." The DoT

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(m) Civil penalties for the failure to comply with any regulation adopted pursuant to this section or for any violation of the provisions of NRS 453D.300.

departed from this mandatory language in NAC 453D.255(1) and made no attempt in the application process to verify that the applicant's complied with the mandatory language of the BQ2 or even the impermissibly modified language.

42. 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 BQ2. This determination violated Article 19, Section 3 of the Nevada Constitution. The determination was not based on a rational basis.

43. The limitation of "unreasonably impracticable" in BQ2[7] does not apply to the mandatory language of BQ2, but to the Regulations which the DoT adopted.

44. The adoption of NAC 453D.255(1), as it applies to the application process is an unconstitutional modification of BQ2.[8] The failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process.[9] The DoT's decision to adopt regulations in direct violation of BQ2's mandatory application requirements is violative of Article 19, Section 2(3) of the Nevada Constitution.

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[7] [Original fn. 12] NRS 453D.200(1) provides in part:

> The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable.

[8][Original fn. 13] For administrative and regulatory proceedings other than the application, the limitation of 5% or greater ownership appears within the DoT's discretion.

[9][Original fn. 14] That provision states:

> 6. The Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant.

45. Given the lack of a robust investigative process for applicants, the requirement of the background check for each prospective owner, officer, and board member as part of the application process impedes an important public safety goal in BQ2.

46. Without any consideration as to the voters' mandate in BQ2, the DoT determined that requiring each prospective owner be subject to a background check was too difficult for implementation by industry. This decision was a violation of the Nevada Constitution, an abuse of discretion, and arbitrary and capricious.

47. The DoT did not comply with BQ2 by requiring applicants to provide information for each prospective owner, officer and board member or verify the ownership of applicants applying for retail recreational marijuana licenses. Instead the DoT issued conditional licenses to applicants who did not identify each prospective owner, officer and board member.[10]

Id., FFCL, ¶¶ 36-47, at 22 AA 5290:7-5292:12. The district court's conclusions of law as contained in its FFCL also address BQ2, NRS 453D.200(6), and NAC 453D.255(1), including:

81. Certain of DoT's actions related to the licensing process were nondiscretionary modifications of BQ2's mandatory requirements. **The evidence establishes DoT's deviations constituted arbitrary**

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[10] [Original fn. 15] Some applicants apparently provided the required information for each prospective owner, officer and board member. Accepting as truthful these applicants' attestations regarding who their owners, officers, and board members were at the time of the application, these applications were complete at the time they were filed with reference to NRS 453D.200(6). These entities are Green Therapeutics LLC, Eureka NewGen Farms LLC, Circle S Farms LLC, Deep Roots Medical LLC, Pure Tonic Concentrates LLC, Wellness Connection of Nevada LLC, Polaris Wellness Center LLC, and TRNVP098 LLC, Clear River LLC, Cheyenne Medical LLC, Essence Tropicana LLC, Essence Henderson LLC, and Commerce Park Medical LLC. See Court Exhibit 3 (post-hearing submission by the DoT).

**and capricious conduct without any rational basis for the deviation**.

82. The DoT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5% prior to award of a conditional license is **an impermissible deviation from the mandatory language of BQ2**, which mandated "a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6).

83. The argument that the requirement for each owner to comply with the application process and background investigation is "unreasonably impracticable" is misplaced. The limitation of unreasonably impracticable applied only to the Regulations not to the language and compliance with BQ2 itself.

84. Under the circumstances presented here, the Court concludes that **certain of the Regulations created by the DoT are unreasonable, inconsistent with BQ2 and outside of any discretion permitted to the DoT**.

85. **The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2**, for the background check of each prospective owner, officer and board member with the 5% or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it **resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution**.

86. **As Plaintiffs have shown that the DoT clearly violated NRS Chapter 453D, the claims for declaratory relief, petition for writ of prohibition, and any other related claims is likely to succeed on the merits**.

87. **The balance of equities weighs in favor of Plaintiffs**.

Id., FFCL, 22 AA 5298:1-27, at ¶¶ 81-87 (bold emphasis added).

In reviewing a statute, it "should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Mangarella v. State, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotation omitted). When the language of a statute is unambiguous, courts are not permitted to look beyond the statute itself when determining its meaning. Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995).

NRS 453D.200(6) provides, "[t]he Department **shall** conduct a background check of each prospective owner, officer, or board member of a marijuana establishment license applicant." (Emphasis added.) The statute is clear on its face and mandatory in application. All owners, or anticipated owners, officers, or board members, must undergo a background check. Moreover, requiring any person with any potential ownership or control interest in the applicant applying for the license, comports with the stated declaration in NRS 453D.020, providing that marijuana should be regulated in a manner similar to alcohol "so that...business owners are subject to a review by the State of Nevada to confirm that the business owners and the business location are suitable to produce or sell marijuana." NRS 453D.020(3)(b).

As addressed above, the district court properly addressed NRS 453D.200(6). NOR's argument DoT's interpretation of NRS 453D.200(6) deserves great deference is incorrect. Nevada Courts do not "defer to the agency's interpretation if, for instance, a regulation conflicts with existing statutory provisions or exceeds the statutory authority of the agency." Public Agency Comp. Trust v. Blake, 127 Nev. 863, 868-869, 265 P.3d, 694, 697 (2011) (internal citations and quotations omitted); see also Manke Truck Lines v. Public Service Comm'n, 109 Nev. 1034, 1036–37, 862 P.2d 1201, 1203 (1993) (holding that questions of statutory construction are purely legal issues to be "reviewed without any deference whatsoever to the conclusions of the agency").

Rather, DoT, in violation of the law, materially changed the substance of BQ2. "Administrative regulations cannot contradict the statute they are designed to implement" nor can an administrative regulation "lawfully modify or contravene a statute." Id. citing Jerry's Nugget v. Keith, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995).

Thus, contrary to NOR's argument, DoT's interpretation does not deserve great deference. Further, there is no justification offered for DoT decision to illegally amend a Ballot Initiative in contravention of the Nevada Constitution to set an arbitrary limit on ownership interests needed to require background checks. DoT's decision to ignore the law, by failing to conduct the appropriate background checks, violated Plaintiffs rights.

Wherefore, contrary to NOR's contentions, the district court properly interpreted NRS Chapter 453D.

**3. The district court properly interpreted NRS 453D.200(6).**

Next, NOR at pages 26-28 of its Opening Brief argues the 5% rule was permitted under NRS 453D.200(1), which requires DoT to "adopt all regulations necessary or convenient to carry out the provisions of" NRS 453D. NOR is incorrect.

The district court, in addressing this issue in its FFCL, made the following conclusions of law:

> 63. Article 19, Section 2 of the Constitution of the State of Nevada provides, in pertinent part:
>
> > "1. Notwithstanding the provisions of section 1 of article 4 of this constitution, but subject to the limitations of section 6 of this article, **the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls**.
> > ***

> 3. If the initiative petition proposes a statute or an amendment to a statute, the person who intends to circulate it shall file a copy with the secretary of state before beginning circulation and not earlier than January 1 of the year preceding the year in which a regular session of the legislature is held. After its circulation, it shall be filed with the secretary of state not less than 30 days prior to any regular session of the legislature. The circulation of the petition shall cease on the day the petition is filed with the secretary of state or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest. The secretary of state shall transmit such petition to the legislature as soon as the legislature convenes and organizes. The petition shall take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby shall be enacted or rejected by the legislature without change or amendment within 40 days. If the proposed statute or amendment to a statute is enacted by the legislature and approved by the governor in the same manner as other statutes are enacted, such statute or amendment to a statute shall become law, but shall be subject to referendum petition as provided in section 1 of this article. If the statute or amendment to a statute is rejected by the legislature, or if no action is taken thereon within 40 days, the secretary of state shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election. If a majority of the voters voting on such question at such election votes approval of such statute or amendment to a statute, it shall become law and take effect upon completion of the canvass of votes by the supreme court. **An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect**." (Emphasis added.)

64. The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [I]nitiative legislation is not subject to judicial tampering-the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as

> originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." Rogers v. Heller, 117 Nev. 169, 178, 18 P.3d 1034,1039-40 (2001).
>
> 65. BQ2 provides, "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." NRS 453D.200(1). This language does not confer upon the DoT unfettered or unbridled authority to do whatever it wishes without constraint. The DoT was not delegated the power to legislate amendments because this is initiative legislation. The Legislature itself has no such authority with regard to NRS 453D until three years after its enactment under the prohibition of Article 19, Section 2 of the Constitution of the State of Nevada.
>
> 66. Where, as here, amendment of a voter-initiated law is temporally precluded from amendment for three years, the administrative agency may not modify the law.
>
> 67. NRS 453D.200(1) provides that "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." The Court finds that the words "necessary or convenient" are susceptible to at least two reasonable interpretations. This limitation applies only to Regulations adopted by the DoT.

See FFCL, 22 AA 5294:14 to 5295:26, at ¶¶ 61-67 (Emphasis in original.)

Thus, contrary to NOR's arguments, the district court properly addressed NRS 453D.200(1) and correctly found the "necessary or convenient" language applies only to Regulations adopted by the DoT. Id., ¶67. It does not, however, as the district court properly addressed, "confer upon the DoT unfettered or unbridled authority to do whatever it wishes without constraint." Id., ¶65. Statutory provisions supersede administrative regulations. See 1992 Op. Nev. Att'y Gen. No. 6 (July 21, 1992) (citing Jones v. Employment Services Div'n of Human Services Dep't., 619 P.2d 542, 1544 (N.M.1980)).

Contrary to NOR's argument, the DoT, as the district court found, "was not delegated the power to legislate amendments because this is initiative legislation" and "[t]he Legislature itself has no such authority with regard to NRS 453D until three years after its enactment under the prohibition of Article 19, Section 2 of the Constitution of the State of Nevada." Id., ¶65. Where, as here, amendment of a voter-initiated law (i.e., BQ2) is temporally precluded from amendment for three years, the administrative agency may not modify the law. Id., ¶66.

Also contrary to NOR's argument, the district court's finding is proper in light of Rogers v. Heller, 117 Nev. 169, 178, 18 P.3d 1034,1039-40 (2001), where this Court recognizing that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [and] initiative legislation is not subject to judicial tampering-the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed." Id., ¶64.

Wherefore, based upon the above, the district court properly found the 5% rule found at NAC 453D.255(1) was not permitted under NRS 453D.200(1), which requires DoT to "adopt all regulations necessary or convenient to carry out the provisions of" NRS 453D because the 5% rule is counter to the mandatory provisions of NRS 453D.200(6). See FFCL, 22 AA 5291, ¶¶41-44.

**4. NOR's argument regarding absurd and unreasonable results is without merit.**

At pages 28-32 of its Opening Brief NOR argues the district court's rulings regarding NRS 453D.200(6) results in absurd and unreasonable results. This argument is without merit.

Article 19, Section 2 of the Constitution of the State of Nevada provides, in pertinent part:

> Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls.

If a majority of voters voting on such question votes to approve such statute or amendment, it becomes law. Nevada Constitution, Art. 19, Sec. 2(3). "An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect." *Id.* (emphasis added).

The district court correctly recognized that initiative petitions must be kept intact "otherwise, the people's voice would be obstructed." See FFCL, 22 AA 005295, ¶ 64 (quoting Rogers, supra, 117 Nev. at 178, 18 P.3d at 1039-40). Further, the district court similarly correctly found that the DoT did not have the authority to legislate amendments because BQ2 was initiative legislation. Id., FFCL, at ¶ 65. The DoT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than five percent prior to award of conditional license was an obvious and impermissible deviation from the mandatory language of BQ2, which was voter approved, and which mandated a "background check of each prospective owner, officers, and board member of a marijuana license establishment." Id., FFCL, at ¶¶ 81-85. Pursuant to the Nevada Constitution, the DoT could not, as the district court properly held, modify the background check requirement set forth in BQ2.

The district court's interpretation of NRS 453D.200(6) was reasonable. "When the words of a statute are clear and ambiguous, they will be given their plain, ordinary meaning," and this Court does not look beyond the language of the statute. State v. Friend, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002) (citing Banegas v. State Indus. Ins. System, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001).

If a statute is susceptible to more than one interpretation it is ambiguous, *and it is only then*, when the Court interprets the statute in accord with reason and public policy to avoid an absurd result. Friend, 118 Nev. at 120; 40 P.3d at 439.

NOR contends that language of NRS 453D.200(6) is ambiguous. A plain reading of the statute demonstrates that there is nothing ambiguous about the language of the statute. This Court does not need to look beyond the plain, language of the statute. NRS 453D.200(6) states: "The Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." The language is clear. It requires mandatory background checks for each owner, officer and board member of an applicant. The statute clearly does not say that the DoT is to conduct background check on half of the prospective owners, on a few of the owners, or on owners who are identified as having a five percent or less ownership interest in the interest applicant. Consequently, it was arbitrary and capricious, as the district found, for the DoT to replace the voter-approved background check requirement in NRS 453D.200(6) with the standard set forth in NAC 452.255(1), *i.e.*, limiting background checks to only those prospective owners, officers, and board members with an ownership interest of five percent or greater. The DoT had no discretion to do so and the revised requirement was inconsistent with the voter-approved language.

NOR further contends that it would be unreasonable for this Court to give the statute a plain reading because it would be too difficult for the DoT to complete background checks. See Opening Brief, pgs. 29-32. As the district court correctly noted, BQ2 specifically identified regulatory and public safety concerns. Given the lack of robust investigative process for applicants, the requirement of the background check for each prospective owner, officer and board member as part of

the application process facilitates the important public safety goal in BQ2. See, FFCL, 22 AA 005292, ¶ 45. Without question, conducting a thorough background check of each prospective owner, officer and board member was the only way the DoT could ensure it prevented the infiltration of criminals and criminal organizations into Nevada's regulated marijuana market application process. In its 2001 report entitled "Behind the Corporate Veil, Using Corporate Entities for Illicit Purposes," the Organization for Economic Cooperation and Development found the following:

> ... a critical factor in misusing corporate vehicles is the potential for anonymity. Not surprisingly, therefore, the types of corporate vehicles that are misused most frequently are those that provide the greatest degree of anonymity, such as international business corporations (IBCs), exempt companies, trusts, and foundations established in jurisdictions that offer a high degree of secrecy and which do not maintain effective mechanisms that would enable their authorities to identify the true owners when illicit activity is suspected. The use of these vehicles can also frustrate financial institutions' efforts to comply with customer identification requirements under anti-money laundering laws. Corporate vehicles, such as corporations, trusts, foundations, and partnerships, are often used together to maximize anonymity. In addition, perpetrators of illicit activities frequently employ various corporate vehicles, each established in a different jurisdiction, in order to frustrate any effort by the authorities to discover the ultimate beneficial owner and controller.[11]

What would actually be absurd is if the DoT could abdicate its responsibilities to conduct background checks of each prospective owner, officer and board member to ensure Nevada's recreational marijuana industry is safe and void of criminal elements because it was a "herculean task" or because it would get "bogged down

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[11] Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, Organization for Economic Cooperation and Development , pp. 21-22, https://www.oecd.org/corporate/ca/43703185.pdf.

in meaningless background checks." It is doubtful the voters who approved BQ2 would consider background checks that addressed their regulatory and public safety concerns meaningless.

**5. NOR's statutory scheme and spirit of the law argument fails.**

Next, NOR argues the district court's rulings regarding NRS 453D.200(6) violate the statutory scheme and sprit of the law. See Opening Brief, at pgs. 32-37. Yet again, NOR is incorrect.

As support for its argument, NOR cites two (2) cases. It cites a portion of a sentence from Justice Stevens' dissenting opinion in FMC Corp. v. Holliday, 498 U.S. 52, 66 (1990), and it relies upon Schaffer v. CC Investments, LDC, 153 F.Supp.2d 484, 485 (S.D.N.Y. 2001), for its discussion of the Securities Exchange Act of 1934. See Opening Brief, at pgs. 32 and 35, respectively. Neither of these address Chapter 453 of the NRS or statutory scheme and/or spirit of the law analysis.

NOR does make reference to other inapplicable and irrelevant statutes and rules. For instance, NOR cites certain gaming *statutes*, NRS 463.569(1), NRS 463.5735(1), NRS 463.643(3), and NRS 643.014645(2)(b) which contain 5% ownership interest language. See Opening Brief, at 34-35. NOR also cites to the federal *statute*, 15 USC 78m(d)(1) which also contains 5% ownership interest language. Id., pg. 35. Obviously, these NOR's citations are to *statutes* which themselves contain specific language dealing with 5% ownership interest.

Here, however, the at-issue statutes, chapter 453D of the NRS, and NRS 453D.200(6) in particular, lack such reference to 5% ownership interest. Nevada law is clear that an administrative regulation (like NAC 453D.255(1) as it applies to the application process) cannot countermand, contradict, or conflict with the requirements of a statutory mandate (like NRS 453D.200(6) here) which the

regulation is intended to implement. "The mere enacting of the mentioned administrative regulation obviously cannot countermand the statutory mandate." Clark County Social Service Dept. v. Newkirk, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990). Administrative regulations cannot contradict or conflict with the statute they are intended to implement. Roberts v. State of Nevada, Univ. of Nevada System, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) (citing Agsalud v. Blalack, 67 Haw. 588, 699 P.2d 17 (1985); New Mexico Bd. of Pharmacy v. New Mexico Bd. of Osteopathic Medical Examiners, 95 N.M. 780, 626 P.2d 854 (N.M. App. 1981) (an administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority)).

NOR also compares NAC 453D.255(1) to NAC 453A.302(1). See Opening Brief, pgs. 33-34. In keeping with the above-referenced authority, however, NOR's contention about these regulations ignores the fact that statutory authority at NRS 453A is not in conflict with the NAC 453A regulation. This can be seen in the fact that NRS 453A.322 contains 5% ownership interest provisions. Again, the at-issue NRS 453D.200(6) does not.

As addressed by the district court in its FFCL (see above) NOR's insistence that a 5% ownership interest provision be grafted onto NRS 453D.200(6) simply cannot be reconciled with general statutory construction principles. This Court teaches that in construing statutes in which certain things are enumerated, that other things are to be excluded. State ex. rel Nevada Tax Comm'n v. Boerlin, 38 Nev. 39, 144 P. 738 (1914). Heywood v. Nye County, 36 Nev. 568, 571, 137 P. 515, 516-17 (1913) (a court has no legislative power and cannot read into a statute a provision not included by the legislature). The Nevada Supreme Court in Department of Taxation v. DaimlerChrysler Services, 121 Nev. 541, 119 P.3d 135 (2005), noted "Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional." Id., at 548, 119 P.3d

at 139. (citing Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.")).

Wherefore, the district court's interpretation of NRS 453D.200(6) and/or NAC 453D.255(1) was proper and its findings and rulings should be affirmed.

**6. The Serenity Applicants have standing.**

NOR argues the Serenity Applicants (and other Plaintiffs at the district court) lack standing to challenge the implementation of NRS 453D.200(6). See Opening Brief, at pages 37-39. NOR's standing argument does not qualify for consideration by the Court because it lacks citation to the part(s) of the record on which NOR relies (NRAP 28(a)(10)(A)) and this lack of citation is reason enough to reject it. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal."). See also NRAP 28(e)(1).

The district court's findings of fact as contained in its FFCL provide, in part, as follows with respect to NRS 453D.200(6).

> 36. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria set forth therein and the provisions of the Ballot Initiative and the enabling statute.
>
> 37. When the DoT received applications, it undertook no effort to determine if the applications were in fact "complete and in compliance."
>
> 38. In evaluating whether an application was "complete and in compliance" the DoT made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).

39. For purposes of grading the applicant's organizational structure and diversity, if an applicant's disclosure in its application of its owners, officers, and board members did not match the DoT's own records, the DoT did not penalize the applicant. Rather the DoT permitted the grading, and in some cases, awarded a conditional license to an applicant under such circumstances, and dealt with the issue by simply informing the winning applicant that its application would have to be brought into conformity with DoT records.

40. The DoT created a Regulation that modified the mandatory BQ2 provision "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant" and determined it would only require information on the application from persons "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." NAC 453D.255(1).

41. NRS 453D.200(6) provides that "[t]he DoT shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." The DoT departed from this mandatory language in NAC 453D.255(1) and made no attempt in the application process to verify that the applicant's complied with the mandatory language of the BQ2 or even the impermissibly modified language.

42. 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 BQ2. This determination violated Article 19, Section 3 of the Nevada Constitution. The determination was not based on a rational basis.

43. The limitation of "unreasonably impracticable" in BQ2[12] does not apply to the mandatory language of BQ2, but to the Regulations which the DoT adopted.

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[12] [Original fn. 12] NRS 453D.200(1) provides in part:

44. The adoption of NAC 453D.255(1), as it applies to the application process is an unconstitutional modification of BQ2.[13] The failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process.[14] The DoT's decision to adopt regulations in direct violation of BQ2's mandatory application requirements is violative of Article 19, Section 2(3) of the Nevada Constitution.

45. Given the lack of a robust investigative process for applicants, the requirement of the background check for each prospective owner, officer, and board member as part of the application process impedes an important public safety goal in BQ2.

46. Without any consideration as to the voters' mandate in BQ2, the DoT determined that requiring each prospective owner be subject to a background check was too difficult for implementation by industry. This decision was a violation of the Nevada Constitution, an abuse of discretion, and arbitrary and capricious.

47. The DoT did not comply with BQ2 by requiring applicants to provide information for each prospective owner, officer and board member or verify the ownership of applicants applying for retail recreational marijuana licenses. Instead the DoT issued conditional

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The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable.

[13][Original fn. 13] For administrative and regulatory proceedings other than the application, the limitation of 5% or greater ownership appears within the DoT's discretion.

[14][Original fn. 14] That provision states:

> 6. The Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant.

> licenses to applicants who did not identify each prospective owner, officer and board member.[15]

Id., FFCL, ¶¶ 36-47, at 22 AA 5290:7-5292:12.

"To have standing, the party seeking relief must have a sufficient interest in the litigation so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party." Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC, 133 Nev. 247, 250, 396 P.3d 754, 757 (2017). It cannot be seriously disputed that the Serenity Applicants (and other Plaintiffs at the district court) have a "sufficient interest" in the ongoing matter and will "vigorously" present its case. "Standing is the legal right to set judicial machinery in motion." "To establish standing in a mandamus proceeding, the petition must demonstrate a 'beneficial interest' in obtaining writ relief." Heller v. Leg. of Nev., 120 Nev. 456, 460-461, 93 P.3d 746, 749 (2004). The Serenity Applicants have beneficial interests in the instant action. "Generally, a party must show [] injury and not merely a general interest that is common to all members of the public." Scwartz v. Lopez, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). "[S]tate courts are not required to comply with the federal 'case or controversy' requirement." Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel, 122 Nev. 385, 394, 135 P.3d 220, 226 (2006). "Standing is a self-imposed rule of restraint." Id. "State courts need not become

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[15] [Original fn. 15] Some applicants apparently provided the required information for each prospective owner, officer and board member. Accepting as truthful these applicants' attestations regarding who their owners, officers, and board members were at the time of the application, these applications were complete at the time they were filed with reference to NRS 453D.200(6). These entities are Green Therapeutics LLC, Eureka NewGen Farms LLC, Circle S Farms LLC, Deep Roots Medical LLC, Pure Tonic Concentrates LLC, Wellness Connection of Nevada LLC, Polaris Wellness Center LLC, and TRNVP098 LLC, Clear River LLC, Cheyenne Medical LLC, Essence Tropicana LLC, Essence Henderson LLC, and Commerce Park Medical LLC. See Court Exhibit 3 (post-hearing submission by the DoT).

enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just an expeditious determination on the ultimate merits." Id. "State courts are free to adopt a case a "case or controversy" justiciability requirement or open their courts to lawsuits that may not meet this requirement." Id.

Further, "[t]he protections of due process attach only to deprivations of property or liberty interests." Burgess v. Storey Cty. Bd. of Com'rs, 116 Nev. 121, 124, 992 P.2d 856, 858 (2000) (quoting Tarkanian v. Nat'l Collegiate Athletic Ass'n, 103 Nev. 331, 337, 741 P.2d 1345, 1349 (1987)). "A protected property interest exists when an individual has a reasonable expectation of entitlement derived from existing rules or understandings that stem from an independent source such as state law." Id. (internal quotations and citations omitted) (emphasis added).

The law is clear that "'a benefit is not a protected entitlement if government officials may grant or deny it in their discretion' and that a property interest arises only when conferral of the benefit is truly mandatory." Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005). The expectation of entitlement is determined largely by the language of the law governing the benefit. Wedges/Ledges of Cal. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994). Thus, while absolute discretion in the licensing context abrogates any expectation of entitlement, a certain amount of discretion can be expected and will not defeat a finding of a protectable property interest, so long as the expectation is reasonable under the circumstances.

Here, Nevada law requires that the DoT "***shall*** approve a license application" if certain criteria are met. NRS 453D.210(5) (emphasis added). If the criteria of NRS 453D.210(5) are met, the only way the DoT may not approve an application is if "competing applications are submitted for a proposed retail marijuana store within a single county." NRS 453D.210(6). The Legislature did

not provide the DoT unfettered discretion in determining which competing applications should be approved. Rather, the DoT "shall use an impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." Id. The Legislature also did not permit the DoT to adopt any scoring method but required it to adopt one that is both impartial and akin to competitive bidding. Id. Put another way, the conditions imposed upon the DoT in reviewing and approving applications reflect the legislative intent to reign in the DoT's discretion. Thus, the lack of discretion in awarding the licenses at issue is clear from the face of NRS 453D, as a whole. Because there is little discretion granted to the DoT, Serenity Applicants have a protectable property interest in the applied-for licenses. As a result, the lack of any review mechanisms in NRS 453D (or any other source of law) violates Plaintiffs' right to procedural due process.

As addressed immediately above, all timely applicants obtained a "statutory entitlement" constituting a "property interest" in the licenses in question and a corresponding "liberty interest" in their right to pursue a lawful occupation as recreational marijuana retailers because under Chapter 453D the Legislature mandated that the DoT "shall" issue them to prevailing applicants under the impartial, numerically-scored and competitive bidding process prescribed and otherwise in accordance with its provisions. See generally FFCL, 22 AA 5288-5290 (regarding discussion of the application and grading issues). Therefore, to the extent that that procedure or any provision of that Chapter was undermined by the Regulation in any manner, as found by the district court in its FFCL, it was never properly determined whether or not they were entitled to the award of licensing and due process was thereby violated.

"Nevada has a long history of requiring a justiciable controversy as a predicate for judicial relief." Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). Justiciable controversy is defined as: 1) a controversy in which a claim of

right is asserted against one who has an interest in contesting it; 2) the controversy must be between parties whose interests are adverse; 3) the party seeking declaratory relief must have a legal interest in the controversy; and 4) the issue involved in the controversy must be ripe for judicial determination. Id.

Here, it cannot be disputed the Serenity Applicants (and other Plaintiffs at the district court) were arbitrarily deprived their due process and equal protection rights by DoT's actions. The Serenity Applicants are asserting claims for their right, against a party whose interests are adverse. The Serenity Applicants have an interest in the licenses at issue and as DoT's actions have already deprived the Serenity Applicants of their constitutional rights, the matter is ripe for judicial determination. See generally Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (outlining the factors considered for ripeness).

As noted above, the district court found the DoT engaged in unconstitutional modification of BQ2 as it applies to the application process – which obviously involved the Serenity Applicants and their rights – and that the "failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process." See FFCL at ¶ 44, 22 AA at 5291:17-22. This is not a case where the Serenity Applicants are challenging a law or action as unconstitutional before the violation occurred. Here, DoT violated the law by failing to adhere to the statute at issue, thereby harming the Serenity Applicants and violating their rights. Accordingly, contrary to NOR's argument, standing is present.

**7. NOR's estoppel argument fails.**

NOR argues the Serenity Applicants should be estopped from challenging the 5% rule. See Opening Brief, pgs. 39-41. NOR's argument lacks merit.

NOR begins its estoppel argument by contending John Ritter of TGIG, LLC was one of the sponsors of the Governor's Task Force working group that proposed the 5% rule to the DoT. See Opening Brief, pg. 39, first paragraph.

NOR's argument sweeps too broadly. Rather, Mr. Ritter testified he was not part of the group that addressed the 5% rule and that it was his understanding that every owner should be background checked:

> BY MR. GENTILE:
> Q Okay. With regard to the Governor's Task Force I want to call your attention to the question of background checks.
>
> A Yes.
>
> Q Okay. Was that subject dealt with in your -- in your involvement with the Governor's Task Force?
>
> A I don't believe that subject was dealt with in this group, but I know that subject was dealt with I believe in the law enforcement group.
>
> Q Okay. And what is -- what was -- what is your memory of what that discussion was with regard to background checks of owners?
>
> A That was a fairly settled issue. The initiative says that the Department "shall" background check each owner or every owner.
>
> Q And was it your understanding that that included shareholders if a company -- if an applicant was in fact an entity that would have shareholders, or members if it was an entity that would have members or the like?
>
> A So an owner means an owner. A shareholder is an owner. So the -- my understanding and the "shall" background check, every owner flows through the initiative, the statute, the regulations, and the application. And it's my understanding that the intent was that every single owner in every single company, every single applicant was to be background checked. Every single owner in our company whether they had a minute percentage of ownership was background checked. Every single one of my owners signed the application. In the beginning or towards the beginning of the applications there are a number of documents that every owner is being asked to sign, attestation documents, there's an addendum, there's other documents, there's fingerprint checks, and every single owner even if they owned

less than 1 percent in our company was required to do each and every one of those things, including fingerprint and background checks.

Q And they were required by the Department of Taxation?

A By the Department of Taxation.

See 30 AA 7386-7387. Further, the district court's FFCL also note there was dissent on the Task Force:

> There was Task Force dissent on the recommendation. The concern with this recommendation was that by changing the requirements on fingerprinting and background checks, the state would have less knowledge of when an owner, officer, and board member commits an offense not allowed under current marijuana law, potentially creating a less safe environment in the state.

See FFCL, 22 AA 5284:19-21, at fn. 7.

Later, and also contrary to NOR's argument, Mr. Ritter went on to testify about why the 5% rule was improper:

> BY MR. HYMANSON:
> Q So, Mr. Ritter, if you changed the entire process and other people ahead of you receive a license, then do you challenge them getting a license when the process is changed?
>
> A Absolutely not. If it's a fair process that's responsive to IP 1 and it's not as flawed as this process was in so many ways, that's fine. We get a license, or we don't get a license.
>
> For instance, public companies got a boatload of licenses in this process. Not one shareholder in those public companies, other than 5 percent or more, was background checked, signed all the documents that the application required. You take out those public companies, whether it's us or somebody else, and there's going to be a lot more room for other applicants. That was completely wrong. Okay.

> Every single shareholder in those public companies needed to be background checked. They needed to sign all the documents that all of our owners and everyone else's of our plaintiffs' owners -- I think with one exception because they're public, I think that that was completely wrong. So the statute says that every owner shall be background checked. The application says -- it has a list of four or five documents or processes that every single owner have to go through.
>
> So for public companies that are not local companies, public companies to come in and have the department just say, oh, arbitrarily, arbitrarily say, oh, we're just going to -¬we're just going to do that for those that have 5 percent or more is completely wrong, and that takes a huge number -- I think it's 20 licenses out of 61 -- that were awarded to public companies in which the shareholders were not background checked as required by law.

See 30 AA 7476-7477. Thus, NOR's arguments about Mr. Ritter's involvement with the Task Force are factually inaccurate, lack merit, and do no support its estoppel contentions.

As best is understood, NOR apparently also argues Serenity Applicants should be estopped from challenging the 5% rule because they knew about the 5% rule before the application process began. See Opening Brief, pg. 39. NOR cites no authority for such a contention. NOR's contention also fails because it ignores the obvious fact that Serenity Applicants could not have contemporaneously apprehended that those regulatory provisions would thereafter have been improperly applied by the DoT resulting in the improper denial of their applications—a proposition that had not yet become a case or controversy ripe for adjudication.

As mentioned in the preceding section, This is not a case where the Serenity Applicants are challenging a law or action as unconstitutional before the violation occurred. Rather, DoT violated the law by failing to adhere to the statute at issue, thereby harming the Serenity Applicants and violating their rights. Thus, NOR's

estoppel argument further fails because Serenity Applicants could not challenge any DoT failure to conduct the background check required by NRS 453D.200(6) in order to determine that "each prospective owner," has not been convicted of certain felony offenses and has not served as an owner of a marijuana establishment that has had its license revoked, particularly with respect to shareowners of public companies, as required by NRS 453D.210(5)(f) and NAC 453D.312(1)—which requires the DoT to deny any application that is not in compliance with any provision of NRS Chapter 453D, until after DoT actually failed to conduct the background checks.

NRS 453D.200(6) requires that a background check be conducted by the DoT with respect to each and every prospective owner of any retail recreational dispensary. This would require that such a check be conducted even with respect to stockholders of publicly-traded companies. That was not done in this case, as found by the district court in its FFCL. And whereas this is perhaps the single most important requirement of Chapter 453D in terms of keeping criminal elements out of the legal marijuana industry, this glaring failure cannot be discounted.

Wherefore, NOR's estoppel argument should be rejected.

**8. <u>Contrary to NOR's argument, the district court's FFCL clearly demonstrate irreparable harm in support of the preliminary injunction.</u>**

NOR, at pages 41-43 of its Opening Brief, argues without citation to the record[16], that the district court failed to articulate irreparable harm for its preliminary injunction. As more fully addressed below, NOR is incorrect.

A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the

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[16] NOR does, however, without citation to the record, make conclusory references to the district court's FFCL. <u>Id.</u>, Opening Brief, pg. 41.

nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief is inadequate. NRS 33.010; Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). "As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm." City of Sparks v. Sparks Mun. Court, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013).[17] Whether to grant or deny a preliminary injunction is within the district court's discretion. Nevadans for Sound Gov't, 120 Nev. at 721, 100 P.3d at 187. In the context of an appeal from a preliminary injunction, questions of law are reviewed de novo and the district court's factual findings are reviewed for clear error or a lack of substantial evidentiary support. Id.

Serenity Applicants have been irreparably harmed because of the repeated statutory and constitutional violations engaged in by the DoT. As the district court held in its FFCL, the Serenity Applicants, and other Plaintiffs below, will be irreparably harmed absent a preliminary injunction because of the constitutional violations engaged in by the DoT. For instance, the district court's FFCL include the following findings of fact (which NOR does not address or challenge in its Opening Brief):

> 51. Nothing in NRS 453D or NAC 453D provides for any right to an appeal or review of a decision denying an application for a retail recreational marijuana license.
>
> 52. There are an extremely limited number of licenses available for the sale of recreational marijuana.

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[17] City of Sparks approvingly cites Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir.1997). Id., 129 Nev. at 357, 302 P.3d at 1124. Monterey Mech. Co. approvingly cites Associated General Contractors v. Coalition For Economic Equity, 950 F.2d, 1401, 1412 (9th Cir.1991) ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm.").

> 53. The number of licenses available was set by BQ2 and is contained in NRS 453D.210(5)(d).
>
> 54. **Since the Court does not have authority to order additional licenses in particular jurisdictions, and because there are a limited number of licenses that are available in certain jurisdictions, injunctive relief is necessary** to permit the Plaintiffs, if successful in the NRS 453D.210(6) process, to actually obtaining a license, if ultimately successful in this litigation.

Id., 22 AA 5293:4-15 (bold emphasis added). Thus, contrary to NOR's argument, irreparable harm is sufficiently apparent via the district court's FFCL.

The district court also made numerous other findings (which NOR also does not address or challenge), which can easily be seen as addressing the irreparable harm issue, including the following:

> 36. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria set forth therein and the provisions of the Ballot Initiative and the enabling statute.
>
> 37. When the DoT received applications, **it undertook no effort** to determine if the applications were in fact "complete and in compliance."
>
> 38. In evaluating whether an application was "complete and in compliance" **the DoT made no effort** to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).
>
> ***
>
> 40. The **DoT created a Regulation that modified the mandatory BQ2 provision** "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant" and determined it would only require information on the application from persons "with an aggregate

ownership interest of 5 percent or more in a marijuana establishment." NAC 453D.255(1).

41. NRS 453D.200(6) provides that "[t]he DoT shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." **The DoT departed from this mandatory language** in NAC 453D.255(1) **and made no attempt in the application process to verify that the applicant's complied with the mandatory language of the BQ2 or even the impermissibly modified language**.

42. 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 BQ2. **This determination violated Article 19, Section 3 of the Nevada Constitution. The determination was not based on a rational basis**.

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44. **The adoption of NAC 453D.255(1), as it applies to the application process is an unconstitutional modification of BQ2** [fn. omitted]. The failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process [fn. omitted]. **The DoT's decision to adopt regulations in direct violation of BQ2's mandatory application requirements is violative of Article 19, Section 2(3) of the Nevada Constitution**.

45. Given the lack of a robust investigative process for applicants, the requirement of the background check for each prospective owner, officer, and board member as part of **the application process impedes an important public safety goal in BQ2**.

46. Without any consideration as to the voters mandate in BQ2, the DoT determined that requiring each prospective owner be subject to a background check was too difficult for implementation by industry. **This decision was a violation of the Nevada Constitution, an abuse of discretion, and arbitrary and capricious**.

> 47. **The DoT did not comply with BQ2 by** requiring applicants to provide information for each prospective owner, officer and board member or verify the ownership of applicants applying for retail recreational marijuana licenses. Instead the DoT issued conditional licenses to applicants who did not identify each prospective owner, officer and board member [fn. omitted].

Id., 22 AA 5290:7-16, 5290:24 to 5291:13, and 5291:17 to 5292:12, respectively (bold emphasis added). The district court also addressed certain other matters in its conclusions of law (again, which NOR does not challenge), including:

> 68. While the category of diversity is not specifically included in the language of BQ2, the evidence presented in the hearing demonstrates that a rational basis existed for the inclusion of this category in the Factors and the application.
>
> 69. The DoT's inclusion of the diversity category was implemented in a way that created a process which was **partial and subject to manipulation by applicants**.
>
> 70. The **DoT staff provided various applicants with different information** as to what would be utilized from this category and whether it would be used merely as a tiebreaker or as a substantive category.
>
> 71. Based upon the evidence adduced, the Court finds that **the DoT selectively discussed** with applicants or their agents the modification of the application related to physical address information.
>
> 72. **The process was impacted by personal relationships in decisions related to the requirements of the application and the ownership structures of competing applicants**. This in and of itself is insufficient to void the process as urged by some of the Plaintiffs.
>
> 73. The DoT disseminated various versions of the 2018 Retail Marijuana Application, one of which was published on the DoT's website and required the applicant to provide an actual physical Nevada address for the proposed marijuana establishment, and not a P.O. Box, (see Exhibit 5), whereas an alternative version of the DoT's application form, **which was not made publicly available and was**

**distributed to some, but not all, of the applicants via a DoT listserv service**, deleted the requirement that applicants disclose an actual physical address for their proposed marijuana establishment. See Exhibit 5A.

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76. **By selectively eliminating the requirement to disclose an actual physical address for each and every proposed retail recreational marijuana establishment, the DoT limited the ability** of the Temporary Employees to adequately assess graded criteria such as (i) prohibited proximity to schools and certain other public facilities, (ii) impact on the community, (iii) security, (iv) building plans, and (v) other material considerations prescribed by the Regulations.

77. The hiring of Temporary Employees was well within the DoT's discretionary power.

78. **The evidence establishes that the DoT failed to properly train the Temporary Employees**. This is not an appropriate basis for the requested injunctive relief unless it makes the grading process unfair.

79. **The DoT failed to establish any quality assurance or quality control of the grading done by Temporary Employees** [fn. Omitted]. This is not an appropriate basis for the requested injunctive relief unless it makes the grading process unfair.

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81. Certain of DoT's actions related to the licensing process were nondiscretionary modifications of BQ2's mandatory requirements. **The evidence establishes DoT's deviations constituted arbitrary and capricious conduct without any rational basis for the deviation**.

82. The DoT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5% prior to award of a conditional license is **an impermissible deviation from the mandatory language of BQ2**, which mandated "a background check of each prospective owner, officer, and board

> member of a marijuana establishment license applicant." NRS 453D.200(6).
>
> ***
>
> 84. Under the circumstances presented here, the Court concludes that **certain of the Regulations created by the DoT are unreasonable, inconsistent with BQ2 and outside of any discretion permitted to the DoT**.
>
> 85. **The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2**, for the background check of each prospective owner, officer and board member with the 5% or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it **resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution**.
>
> 86. **As Plaintiffs have shown that the DoT clearly violated NRS Chapter 453D, the claims for declaratory relief, petition for writ of prohibition, and any other related claims is likely to succeed on the merits**.
>
> 87. **The balance of equities weighs in favor of Plaintiffs**.

Id., 22 AA 5296:1-24, 5297:8-20, 5298:1-9, and 5298:15-27, respectively (bold emphasis added).

As the district court explained, the DoT violated the Ballot Initiative when it "arbitrarily and capriciously" replaced the mandatory requirements of the Ballot Initiative and violated other provisions of NRS Chapter 453D. Id. A number of other violations are noted above from the FFCL, including: (1) the DoT unlawfully communicated with some applicants and not others through a generic email address; (2) the DoT took no effort to determine if the applications were in fact complete and in compliance with the law; and (3) the DoT created regulations that unconstitutionally altered the Ballot Initiative by requiring applications only from owners with a 5% or greater interest in the business. Id. These modifications and

violations of the ballot initiative violated the Nevada Constitution, which irreparably harmed Plaintiffs below. The district court's FFCL, as a whole, demonstrate the same.

**9. The district court properly applied the preliminary injunction.**

For its next argument, NOR argues the district court improperly applied the preliminary injunction. See Opening Brief, at pgs. 43-45. As addressed below, NOR's arguments are incorrect.

NRS 453D.200(6) provides "[t]hat the DoT shall conduct a background check of each prospective owner, officer, and board member of a marijuana license applicant." The DoT created a regulation that modified the mandatory BQ2 provision and determined that it would only require information on the application from persons "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." The district court correctly concluded that the DoT's regulation impermissibly departed from the mandatory language of BQ2. See FFCL, 22 AA 005290-005292.

As a result of that conclusion, the district court enjoined the DoT 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, office and board member as required by NRS 453D.200(6) pending a trial on the merits. Id. FFCL at 22 AA 005300. The district court then asked the Attorney General to provide a list of successful applications who completed the application in compliance with the constitutional requirement as opposed to the DoT's improper regulation limiting it to five percent or greater ownership interest. See 46 AA 11329-11330. The district court asked the Attorney General for that specific information because the district court did not have unredacted versions of the applications for all applicants, and therefore it was impossible for the district court

to make that determination. See 28 AA 006948. The Attorney General identified three tiers of applicants with the third tier being those applicants who did not properly complete the applications in accordance with NRS 453D.200(6). Id. There were four different applicants identified in the third tier. See 28 AA 006834. The Attorney General identified NOR as a third-tier applicant. Id.

The district court's preliminary injunction only pertains to those applicants who submitted applications that were non-compliant with the requirement set forth in NRS 453D.200(6). Id. Thus, the injunction was not arbitrarily applied, and it was otherwise appropriate considering the discrete issues identified in the district court's FFCL. See 28 AA 6841-6864.

**10. The district court properly subjected NOR to the preliminary injunction. NOR admitted it did not comply with NRS 453D.200(6).**

NOR contends the district court had no reason to subject it to the preliminary injunction. See Opening Brief, at pgs. 45-46. Once again, NOR's argument is without merit.

NRS 453D.200 does not define the term "owner", but Steve Gilbert of DoT testified that the term "owner" as phrased in that statute would include a corporation's shareholders. See 33 AA 8235-8238. NOR admitted in the underlying preliminary injunction hearing that it did not have "each" of its prospective owners, officers, or board members background checked in compliance with NRS 453D.200(6). Andrew Jolley, the corporate representative for NOR, testified that NOR did not list the majority of shareholders or all the board members for the company that actually owned NOR at the time its applications were submitted (Xanthic Biopharma Inc. dba Green Growth Brand):

Q … It's true that you did not list all of the owners of Xanthic, right?

A Xanthic is a publicly traded corporation and our understanding was that for a publicly registered or publicly traded companies that you're required to disclose the officers and board members, which we did.

. . .

At no point in time was there a requirement to list every shareholder of Xanthic.

See 28 AA 6883-6888. Mr. Jolley further clarified that the controlling shareholders of Xanthic, which owned 95 percent of NOR were not listed on its applications:

Q Okay. And you did not include the major shareholders of Xanthic; correct?

A I don't agree with that statement.

Q Okay. All Js Greenspace LLC, have you ever heard of that name?

A All Jay Green Piece?

Q All Js Greenspace LLC

A Not off the top of my head.

Q And if I told you they owned 37 million shares of Xanthic, they are 22.5 percent, that's news to you now?

A Can you tell me who the members and managers are of that LLC?

Q Earlier you referenced an individual named Schott something?

A Schottenstein.

Q Yes. So the Schottenstein company is one of the major owners?

A As far as I know, yes.

Q And do you know how much they own?

A My recollection was around 30 percent.

Q Okay. And how about GA Opportunities Corp? They own 27 million shares of Xanthic or 16.5 percent of the company. You didn't list them under the organizational chart, did you?

A I believe we listed everyone that the application required us to list.

Q Okay. I'm not asking if you think you did everything right, I'm asking specifically did you list GA Opportunities Corp. or not?

A GA Opportunities Corp. is not our application, as far as I can recall.

Q And neither was All Js, which by the way is a wonderful name for a marijuana company, All Js Greenspace LLC; right?

A I do not believe we listed All Js.

Q But you did list Liesl – how do you pronounce her last name?

A Liesl Sicz.

Q And she only owned .5 percent of NOR through Harvest; right?

A Yeah, post 95 percent transaction. I'd have to pull that up again and see, but yeah, it was a smaller percentage.

Q Okay. Let's use your 95 percent, these two shareholders that own 37 percent of NOR you didn't list, but the woman who only owned, what was it, .5 percent, you did list as an owner; right?

A Well, you know –

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/ / /

> Q I'm just asking what you did.
>
> A Yeah. So I don't believe we listed those two entities, you know. You're asking me to make certain assumptions that I frankly don't know as I sit here right now, but I know that we did list Liesl Sicz, yes.

Id. 28 AA 6883-6888.

Thus, testimony from NOR's own representative at the preliminary injunction hearing established that the majority of shareholders that have the ability to control Xanthic (All Js Greenspace and GA Opportunies Corp.), and thereby the ability to control NOR, were not listed on NOR's application. Because NOR's application did not identify the two controlling shareholders of its parent public company that possess the ability to control NOR, the DoT could not have conducted a background check of those unidentified entities. As a result, the inclusion of NOR in the third tier of applicants, which did not comply with NRS 453D.200(6), and the subjection to the district court's injunctive relief order was not an abuse of discretion.

According to NOR, NAC 453D.250(2) suggests that it did not have to comply with NRS 453D.200(2). NAC 453D.250(2) pertains to compliance with the provisions of NRS 453D.200 and who must provide information on behalf of persons and entities. The regulation does not state that the DoT cannot conduct a background check of every prospective owner, officer and board member of a marijuana establishment license applicant. Nor does the regulation suggest that a marijuana establishment license applicant does not have to disclose all ownership interests. NOR's reading of NAC 453D.250(2) is overly broad and it completely ignores the mandatory language in NRS 453D.200(6).

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**11. NOR is appropriately subject to the preliminary injunction.**

NOR laments that there are other successful applicants that are owned by publicly traded companies that are not subject to the injunction. See generally Opening Brief, 43-46. According to NOR and without citing to the record, the Essence entities are owned by a publicly traded company. However, taking NOR's assertion as true, the Essence entities' ownership transfer occurred *after* the application process started. The district court's preliminary injunction pertains to applications that were submitted in September 2018 which were non-compliant with NRS 453D.200(6). That statute only applies to applicants. The district court has yet to make any determination regarding post-application disclosure requirements that are set forth in NAC 453D.315. That certainly may be an issue arising and addressed at trial.

NOR further contends, again without citing to the record, that the Attorney General placed several successful applicants in Tier 1 "without conducting any substantive review." There is no evidence, and no evidence in the record is cited to, demonstrating that the Attorney General's evaluation of the successful applicants' ownership representations in their applications, which was ordered to be performed by the district court, was subpar or deficient.

NOR is properly subject to the injunction because the district court preliminary concluded that NOR failed to submit an application that complied with NRS 453D.200(6).

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## III.
## CONCLUSION

Wherefore, consistent with the above, the at-issue orders of the district court should be affirmed.

Respectfully submitted this 12th day of February, 2020.

**CLARK HILL, PLLC**

By: /s/ John A. Hunt, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
John A. Hunt, Esq. (NSBN 1888)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
ph. (702) 862-8300; fax (702) 862-8400
Email: dgentile@clarkhill.com
Email: rmiller@clarkhill.com
Email: jhunt@clarkhill.com
Attorneys for Respondents (less the State of Nevada, Department of Taxation)

## CERTIFICATE OF COMPLIANCE

1. I hereby certify I have read this Answering Brief, that it 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 Answering Brief, pursuant to NRAP 32(a)(5)(A), has been prepared in a proportionally spaced typeface using Word in Times New Roman style at a font size of 14.

2. I further certify that this Answering Brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), this Answering Brief contains 12,485 words.

3. I further certify to the best of my knowledge, information, and belief, this Answering Brief is not frivolous or interposed for any improper purpose. I further certify this Answering 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 transcript or appendix where the matter relied upon may be found. I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 12th day of February, 2020.

**CLARK HILL, PLLC**

By: /s/ John A. Hunt, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
John A. Hunt, Esq. (NSBN 1888)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
ph. (702) 862-8300; fax (702) 862-8400
Email: dgentile@clarkhill.com
Email: rmiller@clarkhill.com
Email: jhunt@clarkhill.com
Attorneys for Respondents (less the State of Nevada, Department of Taxation)

## CERTIFICATE OF SERVICE

I hereby certify that pursuant to NRAP 25(1)(d) on the 12th day of February, 2020, I served a true and correct copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** via the Court's electronic filing and service program (Document Access) to all registered counsel and/or parties.

/s/ Tanya Bain
An employee of Clark Hill PLLC

ClarkHill\J2153\393272\223194558.v5-2/12/20