IN THE SUPREME COURT OF THE STATE OF NEVADA

GREENMART OF NEVADA NLV LLC, a Nevada limited liability company; NEVADA ORGANIC REMEDIES, LLC; and LONE MOUNTAIN PARTNERS, LLC, a Nevada limited liability company, Appellants, vs. SERENITY WELLNESS CENTER LLC; TGIG, LLC; NULEAF INCLINE DISPENSARY, LLC; NEVADA HOLISTIC MEDICINE, LLC; TRYKE COMPANIES SO NV, LLC; TRYKE COMPANIES RENO, LLC; PARADISE WELLNESS CENTER, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; and THE STATE OF NEVADA DEPARTMENT OF TAXATION, Respondents.	Electronically Filed Mar 25 2020 06:59 p.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO: 79668 DISTRICT COURT CASE NO.: A-19-786962-B

APPELLANT GREENMART OF NEVADA NLV LLC'S REPLY BRIEF

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I. INTRODUCTION

In 2016, Nevada voters passed the Regulation and Taxation of Marijuana Act (Ballot Question 2), an act legalizing recreational marijuana for adults 21 years of age or older. In 2018, the Nevada Tax Commission unanimously approved permanent regulations to implement Question 2. Those regulations became effective on February 27, 2018. In July 2018, the Department issued a notice that it would accept applications for 64 recreational marijuana retail store licenses, between September 7, 2018 through September 20, 2018. On December 5, 2018, the Department announced the results of the application process and issued conditional licenses to the highest scoring applicants. Since that date over fifteen months ago, applicants like Serenity Wellness Center, LLC who did not score well enough to merit award of a license have relied on extensive and costly litigation to prevent successful applicants from perfecting their licenses.

Rather than granting the Serenity Applicants' motion for a preliminary injunction on any grounds identified in their complaint (or the complaint of any other disgruntled unsuccessful applicants), the district court granted the request for an injunction based on something that no party had identified as an issue: the Department's well-reasoned and informed decision to limit background checks of potential owners, officers, and board members of an applicant to only those potential owners, officers, and board members who owned a 5% or more interest in a

marijuana entity (the "5% Rule"). Based on this allegedly improper deviation from Ballot Question 2, the district court enjoined the Department from conducting final inspections for any applicant that allegedly did not list every single shareholder in their entity.

This must end—and the injunction must be dissolved—for several reasons, each of which requires reversing the district court.

As an initial matter, there are four fatal flaws with the district court's decision to even entertain the Serenity Applicants' challenge.

First, the Serenity Applicants lack standing because the denial of their applications was not a "contested case" for the purposes of Nevada's Administrative Procedure Act. Even if this were not the case, the Serenity Applicants lack standing because they have suffered no injury in fact.

Second, the doctrines of laches and estoppel bar the Serenity Applicants from challenging the 5% Rule. Although the Serenity Applicants may wish this Court to ignore it, and although they claim to have no memory of it, the record demonstrates that the Serenity Applicants were aware of the 5% Rule. Indeed, the records shows that one of the Serenity Applicants' principles, John Ritter, was a sponsor of the 5% Rule. While Mr. Ritter's memory may be poor, the fact of his sponsorship endures in public records, documentary evidence included in the appendices to this appeal, and the testimony of witnesses at the evidentiary hearing. The record also

demonstrates the Serenity Applicants were aware of the 5% Rule at the time they submitted their applications to the Department. Thus, the Serenity Applicants have no cogent arguments against laches or estoppel.

Third, the district court failed to make any findings—and the Serenity Applicants can point to none—that the implementation of the 5% Rule caused them or will cause them any irreparable injury, a prerequisite for injunctive relief.

Fourth, the district court lacked jurisdiction to consider the Serenity Applicants' petition for judicial review because they failed to name all affected parties in their action, *i.e.*, all of the other entities that participated in the 2018 application process and whose rights may be affected by the outcome of this litigation. Thus, as these four fatal flaws show, the district court should not have even entertained the Serenity Applicants' challenge.

Even if the matter were properly before the district court, the district court ignored this Court's case law and the fact that the Department is entitled to deference in interpreting and implementing NRS Chapter 453D. Both the district court and the Serenity Applicants portray the Department's implementation of the 5% Rule as a "modification" of Ballot Question 2. However, the Department's implementation of the 5% Rule was based on a reasoned interpretation of NRS Chapter 453D's mandate to adopt all regulations necessary and convenient to facilitate the regulation and taxation of recreational marijuana establishments. Indeed, reflecting the very reason

that administrative agencies should be given deference, the district court's pronouncement that the Department is required to background check every single owner of a publicly traded company would render the operation of marijuana establishments unreasonably impracticable because it is a virtual impossibility to conduct a complete and accurate background check of every owner of every share of a publicly traded company. Thus, the district court should not be permitted to rewrite the Department's background check rules.

Additionally, in directing the Department to only assess whether the intervening successful applicants in this litigation (including GreenMart) listed every single owner of their publicly traded companies rather than requiring the Department to assess the compliance of every single applicant—including unsuccessful applicants—the district court violated GreenMart's right to due process, as well as common equitable principles. Both due process and equity demand that if the district court considered the intervening successful applicants' compliance with NRS 453D.200(6), it had to consider the compliance of *all* applicants, including unsuccessful applicants. This is particularly significant given that the applications of several applicants—including the Serenity Applicants—may suffer from the same deficiencies.[1]

[1] Moreover, this narrow, freeze-frame assessment of a select group of applicants is inequitable because some successful applicants were acquired by publicly traded companies immediately after the Department's allotment of licenses.

For all of these reasons, and for the reasons set forth below and in GreenMart's Opening Brief, this Court should dissolve the preliminary injunction entered by the district court below.

II. REPLY TO FACTUAL MISREPRESENTATIONS

In the Answering Brief, the Serenity Applicants make two factual assertions that are not supported—and indeed are controverted—by the record of this case. First, the Serenity Applicants assert John Ritter, an advisory board member, manager, and previous owner of TGIG, LLC, did not support the 5% Rule while on the 2017 Governor's Task Force. (Answering Brief ("AB"), pp. 49-51.) Second, the Serenity Applicants assert they could not have known about the 5% Rule before the Department evaluated applications. (AB, pp. 47-48.) The record contradicts both of these assertions.

A. John Ritter Was a Sponsor of the 5% Rule.

While Mr. Ritter may not have remembered the active role he played as a sponsor of the 5% Rule (*see* AB, 99. 49-50[2]), the Task Force report fills in this gap in his memory. In the Task Force report, Mr. Ritter is listed as an "Individual Sponsor[] of the 5% Rule. (47 AA11521). According to the Task Force report, there was "[n]o dissent" in Mr. Ritter's working group regarding this recommended 5%

[2] (Quoting Mr. Ritter's evidentiary hearing testimony that he did not recall being involved with the working group in the Task Force that recommended the 5% Rule, 30 AA7386-87).

Rule, which was intended to "allow companies that own marijuana establishment licenses in which there are multiple Owners that own less than 5%, in some cases far less, to be able to operated practically and efficiently." (47 AA11521.) Thus, while Mr. Ritter and the Serenity Applicants may have conveniently forgotten Mr. Ritter's role in the adoption of the 5% Rule, the record evidences it.

B. The Serenity Applicants Were Aware of the 5% Rule at the Time of the Applications.

The Serenity Applicants also argue that they "could not have known" about the 5% Rule at the time they submitted their applications to the Department. (AB, p. 47.) Again, however, the record contradicts this bald assertion. At the evidentiary hearing, Ben Sillitoe, a representative of Serenity Applicant Serenity Wellness, LLC (43 AA10521), testified that Serenity Wellness is a publicly traded company with "close to 125 million" outstanding shares, and that he did not know how many shareholders Serenity Wellness had. (43 AA10546-47.)

Mr. Sillitoe testified there were some shareholders that did not want to be on Serenity Wellness's application and were not listed. (43 AA10549). He explained those shareholders were not listed on the application because they owned "[m]uch less than 5 percent" of the stock. (*Id.*) Mr. Sillitoe did not list those owners on Serenity Wellness's application "[b]ecause we were directed to only include those over 5 percent." (43 AA10550.) Mr. Sillitoe also acknowledged he was aware of the 5% Rule at the time Serenity submitted its application. (43 AA10554.)

III. ARGUMENT

A. The Absence of a "Contested Case" Deprives the Serenity Applicants of Standing to Challenge the Implementation of NRS 453D.200(6).

NRS 233B.032 defines a "contested case" as "proceeding … in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." As noted in GreenMart's Opening Brief, NRS Chapter 453D does not provide for a hearing upon the denial of an application for a recreational retail marijuana license (OB, pp. 24-25.) Instead, all NRS Chapter 453D allows for is the Department to implement an "impartial and numerically scored competitive bidding process" for identifying and awarding licenses to the best-qualified applicants.

In *State Dep't of Health & Human Servs. , Div. of Pub. & Behavioral Health Med. Marijuana Establishment Program v. Samantha Inc.*, 133 Nev. 809, 815, 407 P.3d 327, 332 (2017), this Court held that "a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judicial review under the APA or NRS Chapter 453A" because "the application process provided by NRS 453A.322 does not constitute a contested case." This holding effectively precludes the Serenity Applicants from seeking judicial review of the denial of their applications for recreational retail marijuana licenses.

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The Serenity Applicants have no cognizable arguments to overcome this conclusive holding by the Court in *Samantha*. The Serenity Applicants first try to surmount the Court's decision in *Samantha* by "suggesting" it is "distinguishable because of the district court's focus on the scoring of the Serenity application(s) as opposed to *Samantha*'s discussion of the application process for registration certificate [sic] to operate [sic] medical marijuana dispensary." (AB, p. 6.) The Serenity Applicants, however, provide no legal argument to support this assertion.

A "suggestion" that the Court's holding in *Samantha* is distinguishable does not qualify as a cognizable argument against its application here. Appellate arguments must be supported by cogent argument and relevant authority. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (citations omitted). Because the Serenity Applicants have presented no cogent arguments against the application of *Samantha*, this Court can ignore its "suggestion" to distinguish it from this case.

The Serenity Applicants next rely on this Court's opinion in *Minton v. Board of Med. Exam'rs*, 110 Nev. 1060, 881 P.2d 1339 (1994) for the proposition that "the legal process due in an administrative forum should be flexible and call for such protections as the particular situation demands." (AB, p. 6.) While certainly that is

exactly what this Court held in *Minton*[3], that case is distinguishable because, unlike here, the administrative action at issue was a revocation of a medical license following a four-day administrative hearing. *Minton*, 110 Nev. at 1063, 881 P.2d at 1342. This distinction is significant for several reasons. First, unlike here, there was a protectable property interest at issue: the right to practice medicine. *See id.* at 1081, 1354.[4] Second, the appellant in *Minton* was challenging the revocation of a license he had already possessed, not challenging the denial of an application to obtain a privileged license. Third, NRS Chapter 630, the Chapter of the NRS which pertains to medical practitioners, specifically outlines the hearing procedure that must be adhered to in disciplinary proceedings that could lead to the revocation of a medical license[5], including providing for judicial review of any disciplinary decision. Nev. Rev. § 630.356.

Finally, the Serenity Applicants attempt to evade the fact that there is no "contested case" by arguing that because the Department "rejected" their appeal of the decision not to award them licenses, they have standing to seek judicial review.

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[3] *Minton v. Bd. of Med. Examiners*, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994), *disapproved of by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 327 P.3d 487 (2014).

[4] ("[T]he right to practice medicine is a property right protected by the due process clauses of the United States and Nevada Constitutions, and a license to practice medicine may not be arbitrarily abridged or revoked") (citations omitted).

[5] *See* NRS §§ 630.339 – 630.358.

(AB, p. 7) In making this argument, the Serenity Applicants rely on statements made by their counsel during a hearing before the district court. (*Id.*, citing 1 RA28.) Setting aside that "[a]rguments of counsel are not evidence and do not establish the facts of the case,"[6] the fact that the Department "rejected" the Serenity Applicants' appeals is irrelevant because nothing in NRS Chapter 453D provides for judicial review of the Department's decision to award licenses to higher-scoring applicants. Thus, the Serenity Applicants lack standing.

B. The Serenity Applicants Lack Standing to Challenge the Implementation of NRS 453D.200(6) Because They Suffered No Injury in Fact.

To demonstrate standing, a plaintiff must establish three things: (1) injury in fact; (2) causation; and (3) redressability. *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 392, 135 P.3d 220, 225 (2006). After extensive quotation of the district court's Finding of Fact and Conclusions of Law (AB, pp. 9-11), the Serenity Applicants advance a theory that has no support in this Court's case law: that they have standing because they have a "protectable property interest in the applied-for licenses" and NRS 453D.200 does not give the Department discretion "in awarding the licenses at issue." (AB, p. 14; *see also id.* at p. 14 (arguing "all timely applicants obtained a 'statutory entitlement' constituting a

[6] *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (quotation omitted)

'property interest' in the licenses"). However, NRS Chapter 453D does not give the Serenity Applicants any property interest or any entitlement to a license sufficient to establish standing.

This Court's decision in *Malfitano v. Cty. of Storey By & Through Storey Cty. Bd. of Cty. Comm'rs*, 133 Nev. 276, 396 P.3d 815 (2017), is dispositive of this argument. The plaintiff in *Malfitano* purchased two saloons and applied for gaming licenses with the Nevada Gaming Commission (the "NGC"). *Id.*, 133 Nev. at 277, 396 P.3d at 817. After conducting a hearing, the Nevada Gaming Control Board recommended that the NGC deny the plaintiffs' applications. *Id.* The plaintiff also applied to the county's Liquor Board for liquor licenses. *Id.* Although the plaintiff was able to obtain temporary licenses, the Liquor Board ultimately denied his applications. *Id.*, 133 Nev. at 278, 396 P.3d at 817.

In challenging the Liquor Board's denial of his applications, the plaintiff asserted that the Liquor Board violated his due process rights when it denied his liquor license applications. 133 Nev. at 281, 396 P.3d at 819. This Court rejected this assertion, holding that because the Liquor Board did not revoke an existing license (something to which a protectable property right would attach[7]), the plaintiff

[7] *See, e.g., Burgess v. Storey County Board of Commissioners*, 116 Nev. 121, 992 P.2d 856 (2000) (finding that an appellant who had held a brothel license for fifteen years had a protectable property interest in the license because Storey County Code requires a hearing and showing of good cause to revoke a brothel license).

"had no property interest to which the due process notice requirements could apply." *Id.*, 133 Nev. at 284, 396 P.3d at 821.

NRS Chapter 453D does not require the Department to approve all applications for a recreational marijuana license. Instead, the statutory scheme expressly indicates that such applications may be denied, giving the Department the power to adopt regulations necessary to carry out the issuance of licenses, and requiring the Department to "use an impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." NRS 453D.210(6); *see also* NRS 453D.200(2) (providing that the Department "shall approve or deny applications" pursuant to NRS 453D.210). Thus, NRS Chapter 453D does not give the Serenity Applicants a legitimate claim of entitlement to licenses sufficient to satisfy the injury element of standing.

The licensing scheme here did not divest the Department of its discretion. NRS Chapter 453D simply states that "an impartial and numerically scored competitive bidding process" is to be used to facilitate the Department's decision. Moreover, Nevada's competitive bidding statutes likewise provides that any decision is ultimately discretionary. *See Douglas Cty. Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669, 671 (1962) (determination under Nevada's competitive statutes is "a judicial and not a ministerial function;

deliberation was required and discretion was to be exercised"). Thus, the Serenity Applicants have suffered no "injury in fact," and therefore lack standing.

C. The Failure of the Serenity Applicants to Name All Affected Parties Deprives the District Court of Jurisdiction Over Their Petition for Judicial Review.

NRS 233B.130(2), the provision of the Administrative Procedure Act ("APA") that outlines the jurisdictional procedure requirements for a petition for judicial review, mandates that a petitioner "must" "[n]ame as a respondent the agency and all parties of record to the administrative proceeding." "Nothing in the language of that provision suggests that its requirements are anything but mandatory and jurisdictional." *Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012). Accordingly, "it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement." *Id.*, 128 Nev. at 432-33, 282 P.3d at 725.

The Serenity Applicants' attempt to distinguish this Court's opinion in *Otto* is unavailing. The only distinguishing difference between the instant case and *Otto* that the Serenity Applicants point to is that the State Board of Equalization named 9,000 taxpayers that could be affected by the Board's determination that certain properties taxable values had been improperly assessed. (AB, p. 8, citing *Otto*, 128 Nev. at 433, 282 P.3d at 726). This distinction is of no moment. As this Court

observed, NRS 233B.035 defines a "party" as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case." Here, there were 462 applicants whose applications were accepted and considered by the Department during the 2018 application process. By accepting and ranking these 462 applications pursuant to the procedure required by NRS 453D.210(6). By accepting and ranking these applications, the Department effectively "identified" each applicant as a party to the administrative proceeding at issue here: the 2018 application process.

As noted in the Opening Brief, while the identities of all applicants in the 2018 application process were initially confidential, the 2019 Nevada Legislature's passage of Senate Bill 32 made the identities of applicants for licenses publicly accessible effective May 10, 2019. (OB, pp. 30-31; *see also* 16 AA3981-85 (2018 retail marijuana store applications scores and rankings); 16 AA3989-97 (company names and scores for 2018 application period); 16 AA3999-4000 (list of owners, officers, and board members as of May 1, 2019).) Pursuant to NRS 233B.130(2)(a), the Serenity Applicants had 30 days to name these applicants as parties. They did not, and their failure to do so deprived the district court of jurisdiction over their petition for judicial review.

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D. The District Court Was Required to Defer to the Department's Interpretation of NRS 453D.200(6).

Although their Answering Brief is not a model of clarity, the Serenity Applicants appear to assert the district court did not have to defer to the Department's implementation of the 5% Rule because the Department should have literally interpreted NRS 453D.200(6) to require background checks for any person who has a membership interest in a marijuana establishment, regardless of how attenuated that interest might be. (AB, pp. 23-25.)

This is wrong for three reasons. First, the language of NRS 453D.200(6) is not plain and unambiguous; thus, the Department could not have literally interpreted its terms. Second, a literal interpretation of NRS 453D.200(6) would conflict with another provision within the same statute; namely, NRS 453D.200(1), which requires the Department to "adopt all regulations necessary ***or convenient***" to carry out Chapter 453D without making the operation of marijuana establishments "unreasonably impracticable." Third, the Serenity Applicants ignore the deference the courts must show to a governmental agency when interpreting and implementing the statutes it is tasked with enforcing.

1. NRS 453D.200(6) is Ambiguous.

NRS 453D.200(6) provides that the "Department shall conduct a background check of each prospective owner, officer, or board member of a marijuana license applicant." Nothing in the statute or any other provision of Chapter 453D defines the

term "prospective owner." Nor does Chapter 453D define what constitutes a "background check" or specify when a "background check" of "each prospective owner" must occur.

The more general term "owner" is also not defined in the statute or elsewhere in Chapter 453D. Thus, the term must be considered in the context of the applicant that is submitting for the license. Pursuant to Nevada law, an LLC like GreenMart is "owned" by its "members." NRS 86.081. In applying, an LLC that lists each member of the LLC has listed each of its "owners." To argue that anyone else should have been considered as an "owner" of an LLC directly contradicts NRS Chapter 86 and finds no basis in Chapter 453D. The Serenity Applicants' position that applicants with public company parents were required to disclose not just the applicant's members but also ***all shareholders*** of an ultimate public parent company[8] underscores the ambiguity in the statute. To make this argument is to read into the statute an outcome not derived from its plain language. These gaps in the statutory language require the very sort of clarification the Department provided when it implemented the 5% Rule.

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[8] (AB, pp. 24, 32)

2. A Literal Interpretation of NRS 453D.200(6) Would Render NRS 453D.200(1) Nugatory.

"[W]hen possible, we construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (*quoting Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)). If the Court were to adopt the district court's literal interpretation of NRS 453D.200(6), it would render NRS 453D.200(1) and other provisions of Chapter 453D nugatory. Section (1) of NRS 453D.200 mandates:

> [T]he 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.

NRS 453D.030(21) defines "Unreasonably impracticable":

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

At the evidentiary hearing, several witnesses testified just how unreasonably impracticable conducting 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." (*See, e.g.*, 39 AA9588 (testimony of former Department Executive Director Jorge Pupo that conducting a

background check of every single shareholder of a publicly traded company would be "a pretty impossible task"); 41 AA10137 (testimony of former Department Executive Director Deonne Contine's that requiring background checks of every shareholder of a publicly traded company would be impossible and impractical); see also 42 AA10321 (Ms. Contine's testimony that requiring background checks of all shareholders "would basically shut down the [Department's] 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, if the Court were to adopt the district court's interpretation of NRS 453D.200(6) and find the Department is required to conduct background checks on literally every single owner of a marijuana establishment—which would include, for example, checking the backgrounds of every person that holds one of Serenity Wellness's 125 million outstanding shares—the Court would be writing NRS 453D.200(1) out of the statute.

3. The Department is Entitled to Great Deference in Interpreting NRS Chapter 453D and All Its Provisions.

"When determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). This "great deference" is

"heightened where . . . the regulations at issue represent the agency's initial attempt at interpreting and implementing a new regulatory concept." *Texaco, Inc. v. Dep't of Energy*, 663 F.2d 158, 165 (D.C. Cir. 1980) (quotation and internal punctuation omitted). Courts should not defer to an agency's interpretation of a statute if it "conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003). Here, however, the Department's implementation of the 5% Rule neither conflicts with NRS Chapter 453D, nor is it "otherwise arbitrary and capricious."

Faced with an ambiguous statute, the Department interpreted NRS 453D.200(6) in a way that avoided the precise issues the witnesses at the evidentiary hearing testified about. This interpretation, which was manifest in the regulations the Department adopted, was within the discretion of the Department. The Serenity Applicants' Answering Brief, like the district court below, attempts to eliminate the Department's discretion and deference by characterizing the Department's actions as "modifications" of NRS 453D.200(6) rather than "interpretations" of the statute. (AB, pp. 18, 25, 28, 31.)

To support their assertion that the Court should not defer to the Department in its interpretation of NRS 453D.200(6), the Serenity Applicants cite to this Court's decision in *Manke Truck Lines, Inc. v. Pub. Serv. Comm'n.* of Nev., 109 Nev. 1034,

862 P.2d 1201 (1993), for the proposition that courts must not give agencies any deference in questions of statutory interpretation. (AB, pp. 24-25.) The *Manke* Court, however, was referring to an entirely different scenario where the agency made an administrative determination regarding a specific party and held that a reviewing court should treat the review like any other appeal, considering legal issues de novo. 862 P.2d 1201, 1203 (Nev. 1993). Here, where the Department interpreted NRS 453D.200(6) and adopted the 5% Rule, it was not making an administrative decision as to a specific party; it was interpreting and implementing the statute itself. The Department did nothing more than what administrative agencies in Nevada and elsewhere have done for decades: provide guidance and clarification where statutory language contains gaps or ambiguities. Accordingly, pursuant to this Court's case law, the district court should have deferred to the Department's implementation of the 5% Rule.

E. Requiring Background Checks of Small Shareholders of Public Companies Would Lead to Absurd Results.

In *State v. Friend*[9], this Court observed it interprets statutes "in accord with reason and public policy to avoid absurd results," even if that requires rejecting a "plain, literal interpretation" of a statute's terms. 118 Nev. 115, 120-21, 40 P.3d 436, 439 (2002) (citation omitted); *id.* at 124, 441. As discussed above, NRS 453D.200(6)

[9] (Cited at AB, pp. 31-32.)

is ambiguous because it does not define critical terms such as "owner" or "background check" and does not specify when background checks must occur. Given these ambiguities, this Court is not confined to a literal interpretation of the statutes terms and may instead interpret the statute in accord with reason and the public policies and interests that led to the passage of Ballot Question 2 and the adoption of NRS Chapter 453D.

In its Opening Brief, GreenMart listed several reasons why the district court's literal interpretation of NRS 453D.200(6) would lead to absurd and unreasonable results and was unworkable from a practical perspective given the ever-changing nature of ownership in publicly traded companies. (OB, pp. 41-43.) Rather than responding to these specific arguments regarding the absurd and unreasonable results that would be wrought by a literal interpretation of NRS 453D.200(6), the Serenity Applicants simply argued that the language of the statute is plain and accordingly subject to plain-language interpretation, and that therefore the Department acted arbitrarily and capriciously in adopting the 5% Rule. (AB, pp. 31-33.)

The Serenity Applicants fail to respond to GreenMart's specific arguments about the absurd and unworkable consequences that would flow from a literal interpretation of NRS 453D.200(6). Nor should the Court.

There are "unforgiving consequences" for failing to address an argument. *Polk v. State*, 126 Nev. 180, 181, 233 P.3d 357, 357-58 (2010). This Court has repeatedly held that a respondent's failure to respond to an argument can be construed as a confession of error. *Bates v. Chronister*, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (same); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error); *Polk*, 126 Nev. at 186, 233 P.3d at 361 (holding that State's failure to file adequate response to murder defendant's appeal based on alleged violation of his right to confrontation was a confession of error and excluding the State's oral argument on the unaddressed issue). Under this guidance, this Court should deem the Serenity Applicants' failure to address GreenMart's specific arguments regarding the absurd effects of a literal interpretation of NRS 453D.200(6) as a confession of error and bar them from making arguments regarding this issue at any oral argument this Court may permit.

Although the Serenity Applicants declined to address the practical consequences of conducting background checks on every single shareholder of a publicly traded company—regardless of the number of shares they hold or how

attenuated their interest in the company might be—the fact remains that a literal interpretation of NRS 453D.200(6) is absurd and unworkable. (*See*, OB, pp. 41-43; *see also* 35 AA8676-77 (testimony that conducting background checks of all shareholders of a publicly traded company "would be logistically difficult, if not impossible"); 43 AA10682-83 (testimony of a plaintiff representative that identifying all shareholders of a publicly traded company is a "big, complicated process"); 43 AA10715[10].)

F. The District Court's Interpretation of NRS 453D.200(6) Will Thwart the Public's Interest in Access to Legal Recreational Marijuana.

In their Answering Brief, the Serenity Applicants criticize GreenMart for allegedly "fail[ing] to cite any portion of the record" to support its assertion that requiring background checks of all shareholders of a publicly traded company would have a chilling effect on the legal recreational marijuana industry. (AB, pp. 33-34.) The Serenity Plaintiffs ignore, however, that GreenMart included several citations to the record below that support its contention. For example, at page 36 of GreenMart's Opening Brief, GreenMart directed this Court's attention to the

[10] ("If you're part of a mutual fund, they're the owner. A mutual fund might have 200,000 beneficial owners of that fund. You'd have to contact them to see if they would give you the names of all of them. It's also possible a mutual fund can own a mutual fund. So you'd have another 3- or 4,000 people. Plus, ownership changes daily. So one day you might have, if you could get to all those people, it could be hundreds of thousands or maybe even a billion. If you could get all those people, they would change the next day.")

testimony of MM Development Company, LLC representative Robert Groesbeck that conducting background checks of all shareholders of a publicly traded company "would potentially have a chilling effect on the industry." (43 AA10357.) Thus, the Serenity Applicants' complaint is misplaced.

As to the Serenity Applicants' substantive arguments (AB 34-35), GreenMart does not dispute that one of the purposes animating Ballot Question 2 was protecting public health and safety. Pursuant to NRS 453D.020, the legalization of recreational marijuana is intended to protect "the interest of public health and public safety," "to better focus state and local law enforcement resources on crimes involving violence and personal property," and to eliminate criminal involvement from the sale of marijuana. NRS 453D.020(1) and (2). However, the Serenity Applicants' apparent concern regarding the alleged "infiltration of criminals and criminal organizations" is misplaced. (AB, p. 34.)

First, the Serenity Applicants conveniently ignore that pursuant to NRS 453D.210(2), for the first 18 months after the Department began to receive applications for marijuana establishments, the Department could only accept applications for licenses for marijuana establishments "from persons holding a medical marijuana establishment registration certificate pursuant to chapter 453A of NRS." Thus, any applicant during the 2018 application process was already licensed to operate in the marijuana industry, and had already been vetted by the Department

for their suitability.[11] Accordingly, the Serenity Applicants' concern about "criminals and criminal organizations" is misplaced because the Department had already determined that the 2018 applicants were suited to operate a recreational marijuana establishment.

Second, it would not further the public's interest in access to safe, legal recreational marijuana if the Department were required to conduct background checks on every single shareholder of publicly traded company. The purpose behind Ballot Question 2 was legalizing the sale of recreational marijuana. By legalizing the sale of recreational marijuana, the people of the state sought to "better focus state and local law enforcement resources on crimes involving violence and personal property" and eliminate criminal involvement the cultivation and sale of recreational marijuana. NRS 453D.020.

At the same time, the voters also expressed that the Department should adopt regulations to carry out the provisions of NRS Chapter 453D so long as those

[11] (33 AA8239 (testimony of Department Program Manager Steve Gilbert that "in the application process applicants in this last round were already current licensees, so the majority of the applicants that were applying were already vetted through the Department, because they had a valid cultivation or production or dispensary or retail store"); 35 AA8713-16 (Mr. Gilbert's testimony that during the 2018 applicant process, evaluators were able to compare ownership information listed in an application against the information the Department already had about an applicant's ownership information); 41 AA10171 (testimony from Ms. Contine that the entities applying for licenses during the 2018 application already had licenses and thus had been through the background check process with the Department).

regulations do not "prohibit the operation of marijuana establishments, either expressly or through regulations that ***make their operation unreasonably impracticable***." NRS 453D.200(1) (emphasis added). As multiple witnesses at the evidentiary hearing testified, requiring background checks of literally every person that holds even a miniscule interest in a publicly traded corporation would make the operation of marijuana establishments unreasonably impracticable. If the Department is required to conduct background checks in the manner the Serenity Applicants propose, the Department would be effectively unable to approve new license holders or, at the very least would be saddled with a process so cumbersome that the approval of new licenses could take months, if not longer. This would limit the public's access to recreational marijuana, a result directly contrary to the express purpose of Ballot Question 2.

G. The Serenity Applicants Have Failed to Articulate Any Irreparable Harm They Would Suffer if the Preliminary Injunction Was Dissolved.

The Serenity Applicants' Answering Brief further demonstrates the lack of articulated irreparable harm in the district court's preliminary injunction. Irreparable harm "must be articulated in specific terms by the issuing order [granting injunctive relief] or be sufficiently apparent from the record." *Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005) (citation omitted). Judging by their extensive quotation of the district court's order (AB, pp.

37-42), the Serenity Applicants had ample opportunity to direct this Court's attention to any portion of the record where the district court stated the specific harm the Serenity Applicants would suffer if GreenMart were able to open its marijuana establishments for business during the pendency of the action. And by pointing out that GreenMart could not cite to any part of the record where irreparable harm was found, the Serenity Applicants have actually proved the point: GreenMart cannot provide a citation to something that does not exist.

Instead, like the district court before them, the Serenity Applicants state that "Serenity Applicants have been irreparably harmed because of the repeated statutory and constitutional violations engaged in by the [Department]." (AB, p. 36.) But claimed violations of statutes are not the same as irreparable harm. Neither the district court nor the Serenity Applicants can explain the irreparable harm, and the injunction is therefore improper. *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 775–76 (1990) (holding that an injunctive order must be nullified "wherever the reasons for the injunction are not readily apparent elsewhere in the record, or appellate review is otherwise significantly impeded due to lack of a statement of reasons").

H. The District Court's Method for Assessing Applicants' Compliance with NRS 453D.200(6) Violated GreenMart's Due Process Rights.

As discussed in GreenMart's Opening Brief (OB, pp. 16-18), at the close of the evidentiary hearing, the district court ordered the Department to provide it with

information regarding which successful applicants complied with NRS 453D.200(6) but did not require the Department to provide the same information regarding the Unsuccessful Applicants. (46 AA11329-30.) Basic principles of due process and fairness dictate that the district court should have required the Department to provide it with information regarding the Unsuccessful Applicants' compliance with the same statute.

The Serenity Applicants attempt to fault GreenMart for allegedly failing to cite any authority for the idea that the district court should have assessed all applicants' compliance with NRS 453D.200(6). (AB, p. 43.) However, GreenMart's due process claim is tethered to the ultimate authority in this State: the Nevada Constitution. Article 1, Section 8(2) of the Nevada Constitution guarantees that all persons are entitled to due process of law. This right to due process required the district court to assess not just the applications of entities who, like GreenMart, intervened in the litigation to protect their property interests in the licenses they were awarded by the Department, but also those challenging the award of the licenses by the Department. The district court's failure to do so therefore requires dissolution of the injunction.

The Serenity Applicants also attempt to assert that GreenMart somehow sat on its rights to have the FFCL modified. (AB, pp. 46-47.) This argument, however, ignores that, as soon it was timely to do so, GreenMart filed a notice of appeal from

the FFCL. (24 AA5934-49.) Once GreenMart filed its notice of appeal, jurisdiction over the FFCL vested with this Court. *See, e.g.*, *Rust v. CCSD*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *accord Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) ("a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court"). Thus, GreenMart was procedurally barred from modifying the FFCL once it filed its notice of appeal.

I. The Serenity Plaintiffs' Arguments Against Laches and Estoppel is Premised on Factual Misrepresentations.

The Serenity Applicants' arguments against laches and estoppel are premised on two factual misrepresentations: (1) that John Ritter was not part of the working group that proposed the 5% Rule (AB, p. 49), and (2) that the Serenity Applicants could not have known about the 5% rule before the Department evaluated applications. (AB, pp. 47-49.) As discussed above in Section II, both factual assertions are demonstrably false. Thus, the Serenity Applicants have presented no evidence to demonstrate estoppel and laches do not apply. Additionally, the Serenity Applicants present no legal arguments, instead choosing to rely solely on their false factual assertions. This Court should construe the Serenity Applicants' failure to provide a substantive response to GreenMart's legal arguments regarding estoppel and laches as a confession of error. *Polk*, 126 Nev. at 186, 233 P.3d at 361.

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IV. CONCLUSION

For these reasons, the preliminary injunction entered by the district court must be dissolved.

RESPECTFULLY SUBMITTED this the 25th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

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

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

I further certify that this Reply Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 6,818 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 25th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT GREENMART OF NEVADA NLV LLC'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 25th day of March, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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