IN THE SUPREME COURT OF THE STATE OF NEVADA

GREENMART OF NEVADA NLV LLC, a Nevada limited liability company; NEVADA ORGANIC REMEDIES, LLC; and LONE MOUNTAIN PARTNERS, LLC, a Nevada limited liability company,

Appellants,

vs.

SERENITY WELLNESS CENTER LLC; TGIG, LLC; NULEAF INCLINE DISPENSARY, LLC; NEVADA HOLISTIC MEDICINE, LLC; TRYKE COMPANIES SO NV, LLC; TRYKE COMPANIES RENO, LLC; PARADISE WELLNESS CENTER, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; and THE STATE OF NEVADA DEPARTMENT OF TAXATION,

Respondents.

SUPREME COURT CASE NO.: 79668

DISTRICT COURT CASE NO.: A785818

APPELLANT LONE MOUNTAIN PARTNERS, LLC'S REPLY BRIEF IN SUPPORT OF OPENING BRIEF ON APPEAL

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I. INTRODUCTION

Respondents' Answering Brief simply underscores the numerous clear errors of law contained in the district court's Findings of Fact and Conclusions of Law Granting Preliminary Injunction ("FFCL") and demonstrates why reversal is warranted.

Respondents insist that a statutory provision requiring background checks of applicant owners literally requires background checks of persons holding less than one percent ownership of an applicant, and further insist, that such background checks were required to be performed by Nevada's Department of Taxation—an agency that has other responsibilities aside from the licensing of marijuana establishments—within the 90-day statutory deadline between application submissions and the Department's award of *conditional* licenses. Respondents thus take the position that the Department was required to conduct *thousands* of background checks, in addition to grading, scoring, and ranking *hundreds* of applications (each consisting of hundreds of pages), in less than three months' time. To uphold the district court's FFCL, this Court would have to arrive at the same absurd conclusion.

This Court should instead hold, consistent with its precedent, that the Department is entitled to wide deference with respect to interpreting and carrying out statutes it is tasked with implementing. This Court should further hold that the

statutory requirement to background check owners is a requirement that the Department may address between the time of provisional and final licensure, as no statute requires that it be addressed prior to conditional licensure.

Moreover, although it is not necessary to reach the issue to reverse the FFCL, this Court should further hold that the Department's enactment of the five percent rule in NAC 453D.255(1) is consistent with, not in conflict to, NRS 453D.200(6)'s background check requirement, and therefore, is a valid, and reasonable, exercise of the Department's rule-making authority under NRS Chapter 453D.

Finally, Lone Mountain Partners did not waive a hearsay objection to the district court's Exhibit 3 because the statements at issue were unsworn statements of litigation counsel, made after the evidentiary hearing was completed, and were therefore without evidentiary value. The district court committed clear error by basing factual findings, and the preliminary injunction, on these statements when no evidence corroborated counsel's statements.

For each of these reasons, the Court should reverse the district court's FFCL.

II. LEGAL ARGUMENT

Respondents' arguments should be rejected because: (A) Respondents misinterpret *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Svcs.*[1] which is directly applicable here; (B) the five percent rule under NAC 453D.255(1)

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

is consistent with, and a valid interpretation of, NRS 453D.200(6); (C) the Department correctly interpreted NRS 453D.200(6) to avoid an absurd result where large corporations would be ineligible for licensure; (D) Respondents' reliance on *Rogers v. Heller*[2] is misplaced; and (E) Lone Mountain did not waive a hearsay objection because the statements at issue were unsworn statements of litigation counsel, made after the evidentiary hearing was completed, and therefore were without evidentiary value. For all these reasons, the FFCL should be reversed and the preliminary injunction dissolved.

A. Respondents Misinterpret *Nuleaf*, Which Is Directly Applicable Here

Respondents argue that *Nuleaf* is inapplicable because of "fundamental factual differences and differing statutory requirements." Answering Brief at 1. Respondents are mistaken. Although *Nuleaf* involved a challenge to Nevada's medical marijuana licensing process and the present case involves a challenge to Nevada's recreational marijuana licensing process, such "factual differences" are superficial, and the issues involved in the two cases are directly analogous.

More specifically, Respondents argue that the fundamental factual difference between this case and *Nuleaf* is that *Nuleaf* involved a statutory requirement "that plainly provides than an applicant must provide proof of local licensure or a letter certifying compliance with all relevant requirements from the applicable local

[2] 117 Nev. 169, 18 P.3d 1034 (2001).

government before the Department's 90-day statutory deadline for issuing certificates." Answering Brief at 10. Respondents argue that here, unlike *Nuleaf*, NRS 453D has no provision that requires local government certification prior to the corresponding 90-day statutory deadline for issuing certificates. *Id.*

Respondents miss the point. Although no local government certification is required under NRS 453D, there are other licensing requirements listed under the statute that the district court concluded were unmet prior to the 90-day deadline for the Department to issue provisional licenses, namely, a background check on all owners of an applicant. The district court's FFCL concluded that the Department's issuance of conditional licenses to applicants that had, arguably, not complied with all statutory requirements at the time of application submission was improper and rendered those applicants ineligible to obtain conditional licenses. The FFCL enjoins the Department from moving forward on any of those conditional licenses.

This Court in *Nuleaf* determined that because the Department of Health had a 90-day statutory deadline to issue provisional certificates for medical marijuana establishments, but there was no such deadline applicable to the requirement that each applicant provide local government approval, that local government approval was a requirement that could be met between the time of provisional licensure and final licensure. *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human*

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Svcs., 134 Nev. 129, 134-135, 414 P.3d 305, 310-311 (2018). Any other reading of the statutes, this Court concluded, would lead to an absurd result. *See id.*

Although the licensing requirement at issue in *Nuleaf* was the requirement for local government approval, and this case involves owner background checks, the two cases are directly analogous with respect to licensing requirements that cannot plausibly be met within a 90-day statutory deadline. Here, similarly, the Department of Taxation was faced with a 90-day statutory deadline for issuing conditional certificates for retail marijuana establishments. Here, similarly, it would lead to an absurd result if the Court were to determine that background checks of every single owner, officer, and board member of each applicant was required prior to the 90-day statutory deadline for issuing conditional certificates. As such, the Court should determine that the Department was authorized to issue conditional certificates to applicants whose owners had not *yet* all undergone a background check.

Respondents quote the district court's order, which provides that "[t]he DoT's decision . . . to not conduct background checks of persons owning less than 5% ***prior to an award of a conditional license*** is an impermissible deviation from the mandatory language of BQ2 . . . ." Answering Brief at 7 (quoting FFCL ¶ 82) (emphasis altered). However, what both Respondents and the district court have failed to address is that nowhere in the entirety of NRS Chapter 453D, nor in its

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corresponding regulations, is there any requirement to conduct background checks ***prior to awarding a conditional license***.

Indeed, pursuant to the district court's FFCL, applicants that had not met all statutory requirements prior to the 90-day deadline should not have been awarded provisional licenses because the Department had failed to determine whether the applications were "complete and in compliance." *See* FFCL ¶ 36. However, the requirement that the Department determine whether an application was "complete and in compliance" does not even appear in Ballot Question 2, nor anywhere in NRS Chapter 453D. Instead, such requirement exists only in the Department's own regulations, that the Department itself drafted and was responsible for carrying out.

The district court's FFCL provides that "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…" FFCL ¶ 36. However, the Department's interpretation of its own regulations with respect to an application being "complete and in compliance" is entitled to wide deference, especially as it has not even been asserted that such regulation conflicts with any provisions in NRS Chapter 453D.

Consistent with *Nuleaf*, this Court should determine that any requirements for background checks of owners, officers, and board members pursuant to NRS 453D.200(6) are requirements that must be met prior to final licensure, and not

requirements for provisional licensure. Not only in such a holding consistent with *Nuleaf*, but more importantly, it is consistent with the statutory scheme that does not require background checks prior to provisional licensure, but only prior to final licensure, as was the Department's practice here.[3]

Rather than confront Lone Mountain's argument that the background checks under NRS 453D.200(6) are a requirement for *final*, not *provisional*, licensure, Respondents dodge the issue and maintain simply that the background checks are mandatory under the statute. Answering Brief at 12. Respondents thus concede that no statute or regulation requires the Department to background check all owners, officers, and board members of any applicant prior to awarding a conditional certificate. The district court erred by concluding that such a requirement existed. It erred further by enjoining the Department from proceeding with final licensure with respect to applicants that the Department had intended to address ownership issues with during the time period between awarding conditional licenses and awarding final licenses. Accordingly, the district court's preliminary injunction order was based on clear error and must be reversed.

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[3] Again, the Department's issuance of conditional licenses specifically addressed the fact that all ownership issues and background checks must be resolved prior to final licensure, and failure to complete or address them within 30 days within issuance of the conditional licensure could result in a total revocation of the provisional license. *See* LMP Supplemental Appendix 001-001.

B. The Department's Five Percent Regulation Under NAC 453D.255(1) Was a Valid and Permissible Interpretation of NRS 453D.200(6)

Respondents incorrectly argue that the Department's five percent rule was not a valid interpretation of NRS 453.200(6) but instead, constituted an impermissible "amendment" to the statute. Respondents argue that "there is nothing ambiguous about the language of" NRS 453D.200(6) and that it is clear that "[i]t requires mandatory background checks for each owner, officer and board member of an applicant." Answering Brief at 28. However, the term "owner" is inherently susceptible to multiple interpretations, and thus ambiguous. Nowhere is this more evident than in the various ways the term "owner" has been defined in various statutes and regulations in Nevada. Here are several examples of differing definitions found in Nevada statutes and regulations:

> "Owner" means the owner, part owner or lessee of a horse. An interest in only the earnings of a horse does not constitute ownership. A husband and wife are presumed to be in joint ownership of a horse."

Nev. Gaming Reg. 30.118.

* * * *

> "Owner" means a person, including a governmental agency or quasi-governmental agency, that:
>
> 1. Causes a dam to be built, rebuilt or modified;
> 2. Owns or controls real property on which a dam is constructed;
> 3. Owns or controls real property inundated by the reservoir created by a dam;

4. Owns a water right that is impounded or diverted by a dam;
5. Is a successor in interest in a chain of title that expressly mentions a dam;
6. Is a local cooperator who will assume any control over a project constructed by the United States Army Corps of Engineers or the United States Bureau of Reclamation; or
7. Is identified by the State Engineer as a person responsible for a dam.

NAC 535.075.

* * * *

"Unit's owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common-interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common-interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration until that unit is conveyed to another person….

NRS 116.095

* * * *

"Owner or operator" means any person who owns, leases, operates, controls or supervises an affected facility or a stationary source of which an affected facility is a part.

NAC 445B.127.

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> "Account owner" means a person who:
>
> 1. Is legally able to contract under the laws of this State;
> 2. Meets all federal and state requirements governing the Program and a plan; and
> 3. Establishes an account under a plan.

NAC 353B.555.

* * * *

> "Owner" means the person who owns a disposal site or any part of that site.

NAC444.599.

* * * *

> "Owner" means a person to whom title to equipment has been issued or who has lawful possession of equipment, and has the equipment registered and licensed in any state or state or the District of Columbia in his or her name.

NAC 706.094.

* * * *

> "Owner" means an owner of a single-family residence who enters into a contract for work concerning a residential pool or spa with a contractor.

NAC 624.6956

* * * *

In addition to the multitude of definitions for "owner" in Nevada's statutes and regulations, numerous courts have acknowledged the term is inherently ambiguous. *See, e.g.*, *Farmers Ins. Co. of Washington v. USF&G Co.*, 13 Wash. App. 836, 537 P.2d 839 (Wash. Ct. App. 1975) ("We find that the word 'owner' is

ambiguous and the average person may assign it to a wide variety of connotations other than the technical one, i.e., title owner, urged by plaintiff."); *American Indemnity Co. v. Davis*, 260 F.2d 440 (5th Cir. 1958) (finding term "ownership" to be ambiguous); *Dolan v. Welch*, 123 Ill. App. 3d 277, 462 N.E.2d 794 (Ill. App. Ct. 1984) (finding the term "ownership" in an insurance policy to be ambiguous); *Ewers v. Thunderbird Aviation, Inc.*, 289 N.W.2d 94, 99 (Minn. 1979) (finding term "owner" contained in statute to be ambiguous, "thus allowing statutory construction."); *Government Employees Ins. Co. v. Kinyon*, 119 Cal. App. 3d 213, 173 Cal. Rptr. 805 (Cal. Ct. App. 1981) (finding term "owner" in insurance policy ambiguous); *State v. One 2013, Toyota Corolla/S/LE Four-Door, License #437MXR*, 2015 WI App 84, ¶ 25, 365 Wis. 2d 582, 598, 872 N.W.2d 98, 105 (Wis. Ct. App. 2015) ("[T]he undefined term 'owner' is ambiguous.").

Furthermore, Respondents ignore that other state and federal regulations define ownership using a percentage threshold, similar to NAC 453D.255(1). *See, e.g.*, 42 C.F.R. § 424.502 ("Owner means any individual or entity that has any partnership interest in, or ***that has a 5 percent or more direct or indirect ownership*** of the provider or supplier as defined in sections 1124 and 1124A(A) of the Act.") (emphasis added); 13 Mo. Code of State Regulations 65-2.010(28) (same). Nevada's medical marijuana regulations even contained an identical ownership threshold for background checks. *See* NAC 453A.302.

Respondents cite *Public Agency Compensation Trust v. Blake* for the proposition that "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." Answering Brief at 19 (internal quotations omitted). However, *Blake* is inapplicable because it did not involve a statute containing undefined terms which are inherently open to multiple interpretations, and, therefore, ambiguous.

Finally, even if it were true, which it is not, that enacting the five percent rule under NAC 453D.255(1) "materially changed the substance of BQ2," Answering Brief at 19, the district court should not have enjoined the Department from proceeding with final licenses for particular applicants. Instead, the district court should have directed the Department to ensure it followed NRS 453D.200(6) prior to awarding any final licenses. At the time of the injunction, and now as a result of the injunction, the Department has not issued *any* final licenses for retail marijuana establishments. If the district court was concerned that a failure to background check nominal owners violated NRS 453D, the correct course of action would not be to enjoin the Department from moving forward with particular licenses, but instead, to require that the Department conduct those background checks and investigate owner disclosures prior to issuing final licenses. The district court's ruling was overreaching and unnecessary.

In sum, the Department's five percent rule was a valid and reasonable interpretation of the term "owner" contained in NRS 453D.200(6) and should have been upheld by the district court. However, even if the district court concluded that the rule impermissibly deviated from the statute, the district court should have ordered the Department to comply with NRS 453D.200(6) rather than enjoin the Department from issuing final licenses. The district court committed clear error and this Court should reverse the FFCL and dissolve the preliminary injunction.

C. The Department Correctly Interpreted NRS 453.200(6) to Avoid an Absurd Result Where Large Corporations Would Be Ineligible for Licensure

Under the district court's interpretation of NRS 453D.200(6), and the one urged by Respondents, large corporations and public companies would be effectively prohibited from participating in Nevada's marijuana industry, given their large number of owners. Such an interpretation should be rejected under this Court's precedent in *Smith v. Kisorin U.S.A., Inc.*, 127 Nev. 444, 445, 254 P.3d 636, 637 (2011).

Respondents argue that *Smith v. Kisorin* is inapplicable because it addressed corporation dissenters' rights which are not at issue here. Answering Brief at 25. Respondents again adopt an overly narrow reading of case law and rely on irrelevant distinctions.

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The holding in *Smith v. Kisorin* was not limited to dissenters' rights, but rather, addressed statutory construction in a more general sense. In *Smith*, this Court concluded that a construction of the statutes addressing notice to a corporation's owners which "would place unfeasible requirements on corporations" should be rejected in favor of a more practical construction. *Smith*, 127 Nev. at 445. Specifically, this Court held that dissenters' rights notices did not need to be sent to a corporation's "beneficial owners because publicly traded corporations do not have access to contact information for all beneficial owners, and are, in fact, unable to obtain this information unless that beneficial owner does not object." *Smith*, 127 Nev. at 449, 254 P.3d at 640 (citing 17 C.F.R. § 240.14b-2(b)(4)(ii)(B) (2010); *id.* § 240.14b-3). This Court further explained:

> While federal regulations provide that a corporation may ask a record owner to provide a nonobjecting beneficial stockholders list, it has no means to obtain the objecting beneficial owners list as a matter of right. *See* 17 C.F.R. § 240.14a-13(b)(2). Objecting beneficial owners usually account for 75 percent of the beneficial owners, and nonobjecting beneficial stockholders usually account for the remaining 25 percent. *See* Marcel Kahan & Edward Rock, *The Handing Chads of Corporate Voting*, 96 Geo. L.J. 1227, 1244-45 (2008). Accordingly, we conclude that it would be impracticable to require a corporation to send dissenters' rights notices to a population that it has no means of identifying as a matter of right.

Id.

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Based upon the above rationale, this Court concluded that Nevada's legislature "could not have intended to require corporations to send notices to stockholders for whom they have no information" and that "the only reasonable interpretation of those statutes" is an interpretation that corporations were capable of carrying out. *Id.* at 449-450, 254 P.3d at 640. This Court further explained:

> We reach this conclusion because of one very important reason—corporations do not have the right to access all beneficial owners' information. If we determined that beneficial owners must be notified, corporations would be unable to comply with the law. *The Legislature could not have intended this absurd result.*

Id. at 450, 254 P.3d at 640 (emphasis added).

Here, just as in *Smith*, an overly literal interpretation of NRS 453D.200(6) that prohibits large and public corporations from compliance with the statute must be rejected in favor of a more reasonable and practical interpretation that allows corporations to participate in the industry. The Department's enactment of the five percent rule was a valid and logical interpretation of the statutory requirement, and one which permits large companies to participate in the industry. The district court's conclusion that the five percent rule was invalid was clear error. Accordingly, the district court's FFCL, which was based on this erroneous conclusion, should be reversed and the preliminary injunction dissolved.

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D. Respondents' Reliance on *Rogers v. Heller* Is Misplaced

Respondents repeatedly cite *Rogers v. Heller* for the proposition that "an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed." Answering Brief at 24 (quoting *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034, 1039-40 (2001)). However, Respondents selectively ignore the fact that in more recent cases addressing initiative petitions, this Court has distinguished and significantly limited its holding in *Rogers*.

Nevada courts apply standard rules of construction to statutes enacted through voter initiative under which "court[s] must interpret a statute in a reasonable manner, that is, the words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (internal quotations and citations omitted) (applying standard rules of statutory construction to statute enacted through voter initiative). A statute enacted through initiative "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." *See id.* (quoting *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001)).

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In discussing the interpretation of an ambiguous provision of a voter-enacted constitutional amendment, this Court has instructed courts to look at similar materials to those consulted when reviewing legislative history, i.e., "the provision's history, public policy, and reason to determine what the voters intended." *See Miller v. Burk*, 124 Nev. 579, 595-96, 188 P.3d 1112, 1120 (2008).

Thus, the enabling clause found in NRS 453D.200(1), instructing the Department to "adopt all regulations necessary or convenient to carry out" the provisions of NRS chapter 453D, should be interpreted in the same manner as other broadly-worded enabling clauses in statutes enacted by the legislature; that is, affording the Department deference in its interpretation of the statute it is responsible for implementing. *See Nevada Tax Comm'n v. Nevada Cement Co.*, 117 Nev. 960, 968-69, 36 P.3d 418, 423 (2001), *opinion reinstated on reh'g* (Dec. 12, 2001) ("[T]he interpretation by the agency charged with administering a statute is persuasive, and [] great deference should be given to that interpretation if it is within the language of the statute.").

In fact, the enabling clause of a voter initiative should bestow even greater authority on the agency tasked with the duty of implementing the statute, given that the public's right to pass laws through ballot initiatives under Article 19 of the Nevada Constitution is limited to only legislative matters and cannot be used to address purely administrative concerns which are within the appropriate province of

regulatory bodies. *See Garvin v. Ninth Judicial Dist. Court ex rel. Cty. of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) ("[I]nitiative and referendum powers reserved to the people, although broad, are limited to legislation and do not extend to administrative matters.").

Additionally, statutory construction requires that statutes be read in whole, and the meaning of NRS 453D's enabling clause is informed by the single limitation Nevada voters placed upon the Department's authority to prescribe and implement regulations, namely, that the Department not do so in a manner as to make it "unreasonably impracticable" for applicants. *See* NRS 453D.200(1). Question 2 specifically defined "unreasonably impracticable" to mean "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." NRS 453D.030(19). Thus, it is clear that voters intended to bestow broad discretion on the Department in implementing the new licensing regime, with the sole limitation placed on the Department's authority being that the Department not regulate in a manner so as to make licensing "unreasonably impracticable."

Here, adopting Respondents' interpretation of NRS 453D.200(6) to require that every super-minority owner of an applicant, including potentially hundreds or

even thousands of individual shareholders of a publicly-traded company, undergo background checks would certainly make operation of a marijuana business in Nevada "unreasonably impracticable." The Department's interpretation of the background check requirement to apply to only those owners holding a minimum of five percent ownership in any applicant was a reasonable interpretation of NRS 453D.200(6), especially given that such provision must be read in harmony with NRS 453D.200(1), which prohibits unreasonably impracticable regulations.

Additionally, where an initiative contains provisions that are secondary or non-germane to the central purpose of the initiative, a court may sever such secondary provisions if they violate another law without invalidating the entire initiative. *See Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894, 909, 141 P.3d 1235, 1245 (2006). In fact, where a portion of an initiative violates another Nevada statute or the Nevada Constitution, the violative portion "*must be severed* to preserve the people's will." *Id.* (emphasis added).

In *Heller*, this Court addressed a voter initiative addressing eminent domain and property rights. 122 Nev. at 909, 141 P.3d at 1245. Although eminent domain was the primary topic of the initiative, the inclusion of provisions addressing other property rights put the initiative at odds with Nevada's statutory requirement that each ballot initiative be limited to a single subject. *Id.* at 908; *see also* NRS 295.009(1)(a) (single-subject rule). Although past precedent had directed that voter

initiatives should be either upheld in whole, or stricken in whole, the Court distinguished that case law as involving initiatives that were not subject to, or appropriate for, severance. *Id.* at 910-913 (distinguishing *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001), where illegal portion of initiative went to initiative's primary subject and was incapable of severance). This Court further reasoned that the initiative at issue contained a severability clause, providing that "[a]ny provision contained in this section shall be deemed a separate and freestanding right and shall remain in full force and effect should any other provision contained in this section be stricken for any reason." *Id.* at 910. The Court concluded that "the initiative petition's signers have expressed a desire to allow the initiative to proceed even without some sections, and, in severing, this court need not speculate whether the signatories would have signed the petition in its severed form." *Id.*

Three years after *Heller*, this Court again found it appropriate to sever an unconstitutional portion of an initiative to preserve the people's will. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 217 P.3d 546 (2009). In *Chanos*, the Court affirmed the severance of the criminal penalty portion of Nevada's Clean Indoor Air Act ("NCIAA"), which was passed as a ballot measure in 2006, concluding that "[t]he portion severed was not the central component of the statute and the remainder of the statute . . . [could] stand alone." *Id.* at 557. Further

supporting severance was the existence of a severability clause in the NCIAA demonstrating "that the initiative's proponents contemplated that should a constitutional challenge arise, the offending portion of the statute could be severed and the remaining portion could proceed." *Id.*

Here, Question 2, codified in NRS Chapter 453D, contains a severability clause similar to those at issue in *Heller* and *Chanos*. Specifically, NRS 453D.600 provides:

> **NRS 453D.600 Severability. [This section was proposed by an initiative petition and approved by the voters at the 2016 General Election and therefore is not subject to legislative amendment or repeal until after November 22, 2019.]** If any provision of this chapter, or the application thereof to any person, thing or circumstance is held invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of this chapter as a whole or any provision or application of this chapter which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this chapter are declared to be severable.

Accordingly, Nevada voters expressed their will that the provisions of Question 2 proceed even if all the specific provisions of the initiative cannot be enforced due to illegalities or impracticalities. Thus, if any provisions in NRS 453D are determined to be illegal or implausible to implement, the severance of such provisions to preserve the remainder of Question 2 would best maintain the will of Nevada voters.

Moreover, additional provisions of Question 2 further evidence Nevada voters' desire to sever problematic provisions and remove any impediments to the swift commencement of Nevada's retail marijuana industry. Again, NRS 453D.200 provides that the regulations promulgated by the Department of Taxation pursuant to Question 2's enabling clause "must not prohibit the operation of marijuana establishments . . . through regulations that make their operation unreasonably impracticable." NRS 453D.200(1). Question 2 specifically defined "unreasonably impracticable" to mean "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." NRS 453D.030(19).

Thus, the only limitations Nevada voters imposed on the Department's authority was to ensure the Department did not prevent or slow the commencement of the retail marijuana industry, demonstrating that the Department's decision to limit background checks to only those persons owning five percent or more of any applicant, as well as the Department's decision to comply with its 90-day statutory deadline for issuing conditional licenses, and then continue its investigative process prior to issuing final licenses, was not only reasonable, but was the course of action most consistent with its statutory authority. Accordingly, the FFCL, which found

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the Department's five percent rule to be invalid and in conflict with NRS 453D.200(6), is based on clear errors of law and should be reversed.

E. Lone Mountain Did Not Waive a Hearsay Objection Because the Hearsay at Issue Was Not Offered as Evidence but Was Rather Unsworn Representations of Litigation Counsel and Thus Had No Evidentiary Value

It is a fundamental principle of the law of evidence, as set forth in Jury Instruction 1.03 of Nevada's pattern jury instructions, that "[s]tatements, arguments and opinions of counsel are not evidence in the case." N.J.I. 1.03. Instead, the evidence to be considered by a trier of fact "consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel." *Id.*; *see also Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) (noting jury instruction).

This Court can review evidentiary admissions for plain error, even when a party fails to object to the admission at the district court level. *McIellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). To determine whether something arises to plain error, the Court must "examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Id.* (internal citations omitted).

Additionally, when charges are levied against a defendant only after the close of evidence, the defendant fails to receive fair notice of the charges and is denied an

opportunity to defend against the charges. *See Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995).

Here, evidence had already closed and all parties had rested when the district court questioned the Department's litigation counsel—not any of the numerous Department witnesses that had testified—as to which of the applicants were "in compliance with NRS 453D.200(6) at the time the application was submitted in 2018." Based on the Department's litigation counsel's unsworn and out of court representations pertaining to some undisclosed re-review of the applications, Deputy Attorney General Steven Shevorski responded to the district court's question via email, categorizing the winning applicants into three tiers. With respect to Lone Mountain Partners, Mr. Shevorski stated that he "could not eliminate a question regarding the completeness of the applicant's identification of all of its owners." (46 AA11407). Notably, Mr. Shevorski did not state whether his conclusions were based on his own personal review, his own personal knowledge, or indeed, upon what facts, if any, they were based. (*See id.*) Moreover, none of the winning applicant intervenors were provided the opportunity to examine Mr. Shevorski or any Department representative regarding these "post-hearing" statements, to uncover their basis, potential bias, or their veracity.

Additionally, Lone Mountain Partners did not object to the Department's unsworn submission on an evidentiary basis since it had no way of knowing at that

time that the Court would be relying upon the unsworn statements of counsel to make factual findings or that the district court would base its preliminary injunction on the same. Notably, other intervenors did object to the submission on hearsay grounds,[4] an objection the district court failed to directly rule upon, but as is evidenced by the injunction itself, was an objection the district court obviously overruled.

The district court's issuance of a preliminary injunction based on unsworn, out-of-court statements having no evidentiary value was clear error and this Court should, therefore, reverse the district court's FFCL and dissolve the preliminary injunction.

III. CONCLUSION

The Department was tasked with interpreting NRS 453D.200(6)'s provisions and did so in a reasonable manner through its promulgation of the five percent rule under NAC 453D.255(1). Adopting the district court's interpretation of NRS 453D.200(6), and the one that Respondents propose, leads to an absurd result under which large corporations would be effectively prohibited from participating in Nevada's marijuana industry, a result clearly not intended by Nevada voters. Moreover, there exists no statutory requirement that owner background checks were required to be conducted prior to the award of a conditional, as opposed to a final,

[4] See 22 AA005303 (Greenmart of Nevada NLV LLC's objection to the Department's post-hearing email based on it being hearsay).

license. The district court's conclusion that background check and ownership issues had to be resolved prior to the Department awarding conditional licenses within its 90-day statutory deadline was not supported by statute, failed to afford the Department deference it was entitled to in its implementation of the laws it was responsible to carry out, and was clear error. Finally, the district court's preliminary injunction was based on unsworn statements of counsel that had no evidentiary value and were submitted after the close of evidence. For these reasons, this Court should reverse the FFCL.

RESPECTFULLY SUBMITTED this 3rd day of April 2020.

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IV. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,840 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of April 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 2020, I submitted the foregoing APPELLANT LONE MOUNTAIN PARTNERS, LLC'S REPLY BRIEF IN SUPPORT OF OPENING BRIEF ON APPEAL for filing and service via the Court's eFlex electronic filing system.

Karen M. Morrow, an employee of H1 Law Group