SUPREME COURT OF NEVADA
Case No. 79669

GREENMART OF NEVADA NLV LLC,; and NEVADA ORGANIC REMEDIES, LLC
Appellants/Cross-Respondents,

v.

ETW MANAGEMENT GROUP LLC; GLOBAL HARMONY LLC; GREEN LEAF FARMS HOLDINGS LLC; GREEN THERAPEUTICS LLC; HERBAL CHOICE INC.; JUST QUALITY LLC; LIBRA WELLNESS CENTER LLC; ROMBOUGH REAL ESTATE INC. D/B/A MOTHER HERB; NEVCANN LLC; RED GARDENS LLC; THC NEVADA LLC; ZION GARDENS LLC; and MMOF VEGAS RETAIL INC.,
Respondents/Cross-Appellants,

and

THE STATE OF NEVADA DEPARTMENT OF TAXATION,
Respondent,

Appeal from the Eighth Judicial District Court,
Clark County, Nevada
District Court Case # A-19-797004-B
The Honorable Elizabeth Gonzalez

APPELLANT NEVADA ORGANIC REMEDIES, LLC'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

This NRAP 26.1 Disclosure is made in connection with APPELLANT NEVADA ORGANIC REMEDIES, LLC'S OPENING BRIEF. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a).

1. More than 10% of the ownership interest of Appellant Nevada Organic Remedies, LLC is owned by GGB Nevada, LLC. GGB Nevada LLC is 100% owned by GGB Green Holdings LLC. GGB Green Holdings LLC is 100% owned by GGB Holdco. GGB Holdco is 100% owned by GGB Canada Inc., and GGB Canada Inc. is 100% owned by Green Growth Brands, Inc. (formerly known as Xanthic Biopharma Inc.), a publicly traded company listed on the Canadian Securities Exchange.

2. David R. Koch (Nevada Bar Number 8830) and Brody R. Wight (Nevada Bar Number 13615) of Koch & Scow, LLC, are the only attorneys that have or are expected to appear for Nevada Organic Remedies, LLC in this matter.

Dated this 13th day of January 2020.

/s/ David R. Koch
David R. Koch
Attorney for Appellant
Nevada Organic Remedies, LLC

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I. JURISDICTIONAL STATEMENT

This is an appeal of an order granting a preliminary injunction. The district court issued findings of fact and conclusions of law ("FFCL") granting a preliminary injunction on August 23, 2019, and the notice of entry of the FFCL was filed and served on August 28, 2019. As a party to the district court case that is directly and negatively impacted by the injunction, Nevada Organic Remedies, LLC filed its notice of appeal on September 19, 2019, within 30 days of being served the notice of entry of order as required under NRAP 4(a)(1). This Court has jurisdiction to take this appeal under NRAP 3A(b)(3), which states that an appeal may be taken from "[a]n order granting…an injunction…".

II. ROUTING STATEMENT

This matter is properly presumptively retained by the Supreme Court under several provisions of NRAP 17(a). Pursuant to subsection (2), this is a matter involving a ballot question, and it raises, as a primary issue, deference to state agency interpretation of statutes created by ballot question. Under subsection (8), it is an administrative agency case involving Department of Taxation determinations. Under subsection (9), it is a matter originating in a business court. And under subsection (12), it is a matter raising as a principal issue a question of statewide public importance as it concerns the current and future landscape of the recreational marijuana industry in the state of Nevada.

III. ISSUES PRESENTED FOR REVIEW

(1) Did the State of Nevada Department of Taxation (the "Department") act "arbitrarily and capriciously" and "beyond its scope of authority" when it adopted NAC 453D.255(1), which provides a 5% threshold for ownership to be considered in performing a background check of "each prospective owner" of an applicant for a recreational marijuana license?

(2) Was the Department's adoption of NAC 453D.255(1) an "impermissible deviation from the mandatory language of Ballot Question 2," which provided that the Department was to conduct "a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant"?

(3) Did the district court err in arbitrarily subjecting only certain successful applicants to the injunction, while other successful applicants in similar situations were not enjoined?

(4) Did the unsuccessful applicants who moved for the preliminary injunction lack standing to pursue a claim based on the Department's purported failure to conduct background checks on other successful applicants?

(5) Is the preliminary injunction invalid because it failed to specify or articulate irreparable harm that moving parties would suffer if the preliminary injunction were denied?

IV. STATEMENT OF THE CASE

On April 22, 2019, Judge Elizabeth Gonzalez temporarily coordinated a preliminary injunction hearing in four cases filed by several unsuccessful applicants for Nevada recreational marijuana establishment licenses (the "Unsuccessful Applicants"). The cases were filed against the State of Nevada, Department of Taxation, and each lawsuit challenged the 2018 process the Department used to accept and review applications for recreational marijuana licenses and challenged the allocation of licenses.[1] Judge Gonzalez's coordination of cases was limited to conducting an evidentiary hearing on motions for preliminary injunctions filed by the Unsuccessful Applicants.

Nevada Organic Remedies, LLC ("NOR") was a successful applicant in the licensing process and received seven conditional licenses. Along with several other recipients of conditional licenses (the "Successful Applicants"), NOR intervened in the coordinated cases, opposed the preliminary injunctions, and participated in the evidentiary hearing.

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

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

While the district court rejected the vast majority of the Unsuccessful Applicants' arguments, it granted a preliminary injunction on a single legal issue, finding that the Department, in promulgating NAC 453D.255(1), improperly modified NRS 453D.200(6), which requires the Department to conduct a background check of "each prospective owner" of a license applicant. NAC 453D.255(1) purported to limit the application of NRS 453D.200(6) to those owners "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." Determining that the adoption of NAC 453D.255 and its 5% threshold was an "impermissible deviation" from Ballot Question 2, the court issued a preliminary injunction enjoining the Department from conducting a final inspection for any applicant that did not include "each prospective owner" in its application. The court further tasked the Department with determining which Successful Applicants submitted applications that did not comply with the court's

interpretation of NRS 453D.200(6). To the extent the Department determined that an applicant had not complied, the Department would be enjoined from conducting a final inspection of that applicant. This would effectively prevent those applicants from opening for business.

In making its decision, the district court ignored the fact that the same 5% rule was already in place at NAC 453A.302 for the regulation of medical marijuana establishments. This regulation was adopted and has been applied since 2014. In fact, each of the September 2018 applicants for recreational licenses were required by statute to already be medical marijuana license holders, so the same 5% ownership threshold already applied to these applicants. Similar 5% ownership thresholds are codified in Nevada's gaming statutes and federal securities regulations, and this ownership threshold is a reasonable and necessary provision to permit the Department to regulate the industry. Both the Department and other witnesses testified during the hearing that it would be impossible to conduct background checks of every single owner of an establishment if that establishment is a public company whose shareholders may change on a daily basis.

By rejecting the 5% rule, the district court not only failed to provide the Department the deference it was due but also adopted a rigid interpretation of NRS 453D.200(6) that would effectively bar any publicly traded company from operating in the industry. Such an outcome ignores the reality that numerous

publicly traded companies are already operating both medical and recreational marijuana establishments in the State of Nevada. The statute does not indicate any intention to bar publicly traded companies from operating marijuana establishments in the state, and in fact, it explicitly states an intention to avoid making the operation of a marijuana establishment "unreasonably impracticable." *See* NRS 453D.200(1). The district court's rejection of the 5% rule not only ignores agency deference and contradicts the terms of the statute but also harms the entire industry, as publicly traded companies own and operate many of the best establishments in the state of Nevada.

In addition to the above, the preliminary injunction should also be overturned because (1) the court did not articulate any irreparable harm to the Unsuccessful Applicants, (2) the Unsuccessful Applicants lacked standing and should have been estopped from asserting the 5% rule as a basis for an injunction, and (3) the court arbitrarily applied the injunction only to NOR and a limited set of other Successful Applicants.

V. STATEMENT OF THE FACTS

A. The Recreational Marijuana License Application Process

The initiative to legalize recreational marijuana, Ballot Question 2 ("BQ2"), was approved by Nevada voters in 2016. BQ2 was enacted and codified as NRS 453D.

As the government agency charged with the implementation of the Nevada recreational marijuana program under NRS 453D.200(1), the State of Nevada Department of Taxation (the "Department") was required to "**adopt all regulations necessary or convenient** to carry out the provisions of" NRS 453D. The Department did so, and these regulations were adopted in early 2018 as NAC Chapter 453D.

In September 2018, pursuant to NRS 453D and NAC 453D, the Department accepted applications for licenses to open recreational marijuana establishments throughout Nevada. It received over 460 applications, all from applicants who already held medical marijuana licenses in the state. (*See*, 47 AA 011569-011575 for a list of all applicants).[2] Pursuant to NRS 453D.210(4), the Department had 90 days to grade and rank the qualifying applications, and it finished the task using qualified independent contractors hired for this specific purpose in order to protect the grading process from bias. (*See*, 33 AA 008243-008244). The Department awarded conditional licenses to the highest scoring applicants on December 5, 2018. (*See*, 47 AA 011569-011575 for a list the successful applicants). With only

[2] Under NRS 453D.210(2), the Department was only permitted to receive applications from parties who already held a medical marijuana establishment registration certificate pursuant to NRS Chapter 453A. Most of the entities that applied also already held a recreational marijuana license through the "early start program," which allowed existing medical establishments to open recreational establishments before the 2018 application period began.

61 licenses available, and over 460 applications submitted, many applicants that were already successfully operating marijuana establishments in Nevada were unsuccessful in obtaining a license.

At the time the applications were submitted, many applicants—both successful and unsuccessful—were owned in whole or in part by publicly traded companies. (*See*, *e.g.* 42 AA 010353, 010354; 43 AA 010521; 43 AA 010681-010684; 44 AA 010834). Other applicants were acquired by publicly traded companies soon after applications were submitted and before the preliminary injunction hearing took place. (*See*, *e.g.*, 44 AA 010781, 42 AA 010355, 101356). At the time its application was submitted, NOR had sold 95% of its membership interest to GGB Nevada, LLC, a wholly owned subsidiary of a publicly traded Canadian corporation.[3]

B. Unsuccessful Applicants File Lawsuits

After being notified of the conditional license results, many Unsuccessful Applicants assumed the Department must have erred in grading the applications.

[3] On September 4, 2018, NOR completed a transaction whereby it sold 95% of its membership interest to GGB Nevada LLC, a wholly owned subsidiary of Xanthic Biopharma, Inc ("Xanthic"). Xanthic, now known as Green Growth Brands, Inc., was and remains a publicly traded Canadian corporation listed on the Canadian Securities Exchange. The remaining 5% of NOR membership interest was to be transferred upon the satisfaction of an outstanding promissory note between GGB Nevada and the NOR sellers, which note was satisfied on August 27, 2019. *See*, NOR's Organizational Chart submitted with its application and produced as 47 AA 011576 -011590.

They filed numerous lawsuits against the Department challenging the application process and alleging improprieties in the applications themselves, in their scoring, and in the allocation of licenses among applicants. (*See*, 1-2 AA 000013-000372.) Several of the Successful Applicants, including NOR, intervened in the lawsuits to protect their conditional license rights and defend the Department's process. (*See*, *e.g.*, 4 AA 000986-000990; 5 AA 001127-001137; 6 AA 001289-001292; 6 AA 001308-001312; 8 AA 001820-001821).

Plaintiffs in four of the cases filed motions for preliminary injunction against the Department, seeking to enjoin the opening of any new establishments under the conditional licenses. (4 AA 000769-000878, 6 AA 001355-001407, 11 AA 002535-002540). Judge Gonzalez coordinated four of the cases in Department XI of the Eighth Judicial District solely for the purpose of holding an evidentiary hearing on these motions. (20 AA 004938-004940).

The evidentiary hearing began on May 24, 2019, and did not conclude until four months later, on August 23, 2019. (Transcripts at 29-46 AA 007170-011332). The moving parties—all of which were Unsuccessful Applicants—used those four months to conduct an extensive (and unwarranted) in-court fishing expedition into the entire application process, searching for a fatal flaw to justify setting it aside. The Unsuccessful Applicants made myriad arguments throughout the hearing, challenging everything from the Department's inclusion of diversity as a grading

criterion, (*See*, *e.g.*, 45 AA 011108, 011109), to its scoring of locations, (*See*, *e.g.*, 45 AA011102-011104), to its use of outside contractors in the grading process. (See, *e.g.,* 45 AA 011156).

C. The Provision to Conduct a Background Check of "Each Prospective Owner" Issue Is Raised During the Preliminary Injunction Hearing

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

In considering ownership of applicants, the Department adopted a regulation in NAC 453D.255(1) providing that, among other things, the background check requirement would "**only apply to a person with an aggregate ownership interest of 5 percent or more** in a marijuana establishment" (the "5% rule") (emphasis added). An identical 5% rule had been adopted in 2014 for medical marijuana establishments (*see* NAC 453A.302), and witnesses from the Department testified that the 5% rule was a reasonable interpretation of the statute that was necessary to allow the Department to regulate the industry while also ensuring that "the interests of the State are protected" as well as "public safety." (39 AA 010068).

The adoption of the 5% rule was not a surprise. It had been specifically requested by the industry and was expressly recommended by the Governor's Task Force in 2017 through a working group headed by one of the principals of the Unsuccessful Applicants, John Ritter. (46 AA 011436, 011437).[4] Before these regulations were adopted in 2018, the Department complied with the process for drafting regulations, sending them to workshops, and submitting them to the Legislative Council and to the Legislative Commission for approval. (39 AA 010109).

The 5% rule serves to ensure that the Department need not conduct background checks of minor shareholders who have no ability to control a company. This regulation especially considered the practical regulation of publicly traded companies—which included both Successful and Unsuccessful Applicants—so that the Department would not be required to conduct background checks on hundreds, or even thousands, of nominal shareholders who have no real ability to control the company, and whose shares may trade hands multiple times each day.

[4] John Ritter, an advisory board member, manager, and previous owner of Respondent TGIG, LLC, was one of Respondents' primary witnesses in the evidentiary hearing. Ritter was a sponsor for the "Taxation/Revenue/Regulatory Structure Working Group" on the Governor's Task Force that expressly recommended the 5% rule be adopted by the Department as a regulation. (46 AA 011493).

NOR is one of many marijuana licensees that have a publicly traded parent company. Others include GreenMart and the Essence entities on the Successful Applicant side, (44 AA 010781), and, among the Unsuccessful Applicants, MM Development, which owns Nevada's largest dispensary, Planet 13, (42 AA 010353, 010354), Serenity Wellness, (43 AA 010521), LivFree Wellness, (42 AA 010355, 101356), GB Sciences, (44 AA 010834), and Green Leaf Farms all have public ownership. (43 AA 010681-010684). Each of these entities are already operating medical and recreational marijuana establishments in the State under existing regulations.

Before the evidentiary hearing, none of the Unsuccessful Applicants raised the 5% rule or its application to the requirements of NRS 453D.200(6). (*See*, all Complaints and Motions for Preliminary Injunction cited above). It was not until the middle of the evidentiary hearing, when the same John Ritter who recommended the 5% rule to the Governor's Task Force was called as a witness and stated his new belief (which was in direct contradiction to the recommendations contained in the Governor's Task Force Report) that the argument that the 5% rule somehow violated NRS 453D.200(6) became an issue. (29 AA 007386).

D. The District Court Finds the 5% Rule to Be an "Impermissible Deviation" from BQ2 and Issues a Preliminary Injunction on this Basis

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

During the hearing, the district court criticized the Department's adoption of the 5% rule as an improper amendment to the language of the statute. For example, the court asked Jorge Pupo, Executive Director of the Marijuana Enforcement Division for the Department: "Sir, can you explain to me **why the Department thought it was a good idea to change the language of the ballot question** which

[5] Judge Gonzalez asked for pocket briefs to address distinctions in agency discretion in passing regulations "related to an initiative petition, as opposed to legislation." (*See*, 34 AA 008276-008277).

said that you had to check each prospective owner's background and change it to anyone who held a 5 percent interest or more?" (37 AA 009168).

Later, former Executive Director Deonne Contine, who was primarily responsible for the Department's adoption of the regulations in NAC 453D, explained that the Department's decision to adopt the 5% rule among other regulations found "a balance of the unduly burdensome and the public safety…and having the regulation go through the process. I believe that it was protecting the public health and safety. And the regulations complied with the statute." The court immediately challenged Ms. Contine's explanation by asking: "So, Ma'am, **you believed you could substitute your judgments for the voters' of the State of Nevada**?" Contine responded: "I believe that we went through the process that we went through and we interpreted the provisions and we considered all the responsibilities that we had under the initiative. And I believe that the regulation was validly adopted and it is valid, yes." (42 AA 010292-010293).

Despite the Department's explanation of the purpose and utility of the 5% rule and its existing use in the medical marijuana realm, Judge Gonzalez held that the 5% rule was invalid. The court's FFCL cited Article 19 of the Nevada Constitution and found, "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." (22 AA 005294 ¶63, 005295 ¶66). It further held that

"the Department's decision 'to not require disclosure on the application and to not conduct background checks on persons owning less than 5% prior to award of a conditional license is an **impermissible deviation** from the **mandatory language** of … NRS 453D.200(6)." (22 AA 005298 ¶82.) Based solely upon this "impermissible deviation," the court found a likelihood of success on the merits justifying an injunction.

E. The Court Uses an Irregular Process to Determine the Scope of the Injunction

After finding the 5% rule to be an "impermissible deviation" from the statute, the district court attempted to tailor the injunction. It enjoined the Department from conducting required pre-opening final inspections for any establishment of any Successful Applicants who "did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6) pending a trial on the merits." (22 AA 005300). With final inspections required for an establishment to open for business, the injunction effectively precluded any Successful Applicant from opening if the Department determined that not every owner may have been listed on the application.

On the last day of the evidentiary hearing, the district court requested the Attorney General's office (the "AG"), which represented the Department, to provide a list of "[w]hich successful applicants completed the application in compliance with NRS 453D.200(6)." (46 AA 011329-011330). The purported

purpose of this request was to determine which applicants may be subject to the injunction.

Though NRS 453D.200(6) is an obligation ***on the Department*** to conduct background checks and not a requirement for applicants to "complete their applications," the AG attempted to respond to the court's instruction. The AG eventually sent an email placing each Successful Applicant into one of three "Tiers." (46 AA 011406-011407). Tier 1 was defined to include all Successful Applicants that had not intervened in the actions. In identifying Tier 1 members, the Department did *not* check ownership, instead relying on the "applicants' attestations regarding who their owners, officers, and board members were at the time of the application." These applicants, for reasons that remain unexplained, were automatically deemed to have complied with NRS 453D.200(6).

Tier 2 included those intervenors "whose applications were complete with reference to NRS 453D.200(6) if the Department of Taxation accepts as truthful who their owners, officers, and board members were." (46 AA 011406-011407).

Finally, Tier 3 included any Successful Applicant for which the AG "*could not eliminate a question* as to the completeness of their applications with reference to NRS 453D.200(6)." (*Id.*). Four Successful Applicants were placed in Tier 3, including NOR. The AG offered multiple, differing explanations as to why it classified certain parties as Tier 3, including statements about applicants being

"acquired by a publicly traded company," or having a "subsidiary of a publicly traded company [that] owned a membership interest in the applicant."(*Id*.).

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

Relying entirely on the AG's email, Judge Gonzalez applied the injunction only to those entities listed in Tier 3. This hearing was held on August 29, 2019, after the FFCL had already been filed. (See 46 AA 01133-011405).

F. NOR Disclosed 100% of Its Ownership in Its Applications

To this day, it remains unclear to NOR why it was placed into Tier 3 and is subject to the injunction. NOR listed every one of its owners—its members—in its application. This included owners with less than 5% ownership interest.[6] NOR had that same ownership structure expressly approved by the Department on August 20, 2018, nearly a month before it submitted its applications, (47 AA 0111591-

[6] The organizational chart submitted in NOR's applications listed every member with an ownership interest in the limited liability company. (47 AA 011576-011590)

011600). The Department, moreover, continued to approve NOR's full list of owners in the Department's register of owners. (29 AA 007110-007114).

The AG ostensibly put NOR in Tier 3 because it believed NOR "was acquired by a publicly traded company," and there may have been undisclosed shareholders "who owned a membership interest in the applicant." (46 AA 011407). The AG appears to be referring to Xanthic Biopharma, Inc., a publicly traded company that owned one of NOR's owners, GGB Nevada, LLC. But Xanthic's shareholders are not relevant to the determination, as the Department has never deemed Xanthic or its shareholders as "owners" of NOR in the past. In other words, the AG conflated the owners of NOR's parent company with the owners of NOR even though the Department has never before considered the owners of NOR to include the owners of the parent company.

NOR attempted to clarify this issue by filing an objection with the district court (23 AA 005510-005532) and recently filed a petition for a writ of mandamus to compel the Department to move NOR into Tier 2. (29 AA 007072-007126). The court has denied all of these efforts, in part because it has deemed this appeal to be a viable alternative remedy to the petition for writ of mandamus.[7]

[7] NOR's Motion for Writ of Mandamus to Compel the State of Nevada, Department of Taxation to Move NOR into "Tier 2" was denied on December 9, 2019 on the grounds that this appeal is a viable alternative remedy to the writ of mandamus. A proposed order to this effect has been submitted to the court but has not been signed as of this writing.

G. The Court Does Not Specify Any "Irreparable Harm" in the Injunction

Finally, while the FFCL granting the injunction mentions the words "irreparable harm," it does not specify any identifiable irreparable harm that may be suffered. The FFCL acknowledged that the Unsuccessful Applicants had the burden of demonstrating the Department's conduct, if allowed to continue, would result in irreparable harm in order to obtain an injunction, (22 AA 005294 ¶60), but the FFCL does not state the Unsuccessful Applicants met their burden. The only reference in the FFCL that actually considers the existence of irreparable harm is a statement that "a constitutional violation may, by itself, be sufficient to constitute irreparable harm." (*Id.* at ¶62) (citing *City of Sparks v. Sparks Mun. Court*, 302 P.3d 1118, 1124 (Nev. 2013)). The district court apparently determined that if the Department violated Article 19 of the Constitution in adopting the 5% rule, irreparable harm could be presumed.

VI. SUMMARY OF THE ARGUMENT

Ballot Question 2 provided that the Department is to conduct a background check "of each prospective owner, officer, and board member of a marijuana establishment license applicant." In carrying out this and other provisions of the statute, the Department adopted a regulation similar to those already existing in the regulation of medical marijuana establishments, gaming licensees, and securities ownership that applied a 5% threshold for ownership to be considered and

reviewed by the Department. As described by the Department itself, the 5% threshold was reasonable and necessary to carry out its responsibilities under the recreational marijuana initiative.

The district court erred in issuing the preliminary injunction based on the existence of the 5% ownership regulation. In doing so, it failed to provide the Department the great deference it is entitled in interpreting NRS Chapter 453D and, instead, imposed its own interpretation of the statute. The court's interpretation of NRS 453D.200(6) creates a result that Nevada voters could not have intended. In reading that statute to require background checks on every single shareholder of a public company, the district court imposed an absurd and impossible obligation upon the Department: conduct a background check on all public company shareholders, no matter their amount of holdings, their involvement in the business, or even their knowledge of the company itself. The Department's adopted 5% rule, by contrast, interprets the statute reasonably, requiring background checks on owners who may have actual influence over marijuana license applicants while simultaneously making it practical for the Department to conduct all necessary background checks. In rejecting the 5% rule, the district court came to an improper legal conclusion that requires reversal of the preliminary injunction.

Additionally, the district court applied the preliminary injunction to NOR in an arbitrary and capricious manner that constitutes an abuse of discretion. NOR did not violate any statute or regulation, but it has now been penalized and precluded from opening its establishments even after disclosing 100% of its ownership. Meanwhile, other successful applicants are not subject to the injunction either by virtue of not intervening in the licensing lawsuits or by transferring ownership to a public company after they submitted their application but before perfecting their licenses. That result makes no sense.

The district court further erred in assuming the Unsuccessful Applicants possessed standing to challenge the Department's interpretation of the background check requirement in NRS 453D when the Unsuccessful Applicants will not suffer any damages that are not common to the general public. Moreover, because the Unsuccessful Applicants failed to challenge the 5% rule until after the application period, they should have been estopped under equitable defenses from challenging the 5% rule.

Finally, the district court's failure to articulate any irreparable harm in the FFCL constituted an abuse of discretion. Indeed, the only harm the Unsuccessful Applicants have ever articulated is a loss in the recreational marijuana "market share," but this is not a harm that the background check component of NRS

453D.200(6) is designed to address and cannot, therefore, constitute irreparable harm sufficient to justify the preliminary injunction.

VII. ARGUMENT

A. Standard of Review for an Appeal of a Preliminary Injunctions

To obtain a preliminary injunction, the Unsuccessful Applicants were required to show: (1) they were likely to succeed on the claims at the heart of the injunction, and (2) they would suffer irreparable harm if the preliminary injunction were denied. *See*, NRS 33.010; *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC*, 215 P.3d 27, 31 (Nev. 2009). In determining whether the district court properly found that the Unsuccessful Applicants met the above burden, this Court should review the district court's factual findings for an abuse of discretion, and should review *de novo* its legal determinations, which include any questions of statutory construction and any questions of standing. *See*, *Sarfo v. Bd. of Med. Examiners*, 429 P.3d 650, 652 (Nev. 2018); *Saticoy Bay LLC Series 9641 Christine View v. Fed. Natl. Mortg. Assn.*, 417 P.3d 363, 366 (Nev. 2018); *S. Highlands Comm. Ass'n v. San Florentine Ave. Tr.*, 365 P.3d 503, 504–05 (Nev. 2016); *City of Sparks v. Sparks Mun. Ct.*, 302 P.3d 1118, 1125 (Nev. 2013).

The district court both abused its discretion in making its factual determinations and came to several improper legal conclusions in granting the

Preliminary Injunction. Accordingly, this Court should reverse the order granting the Preliminary Injunction.

B. The Unsuccessful Applicants Did Not Meet Their Burden to Show They Are Likely to Succeed on the Merits

1. The Department Is Entitled to "Great Deference" in Interpreting NRS Chapter 453D

This Court has consistently held that when tasked with determining the validity of an administrative regulation, courts "must afford great deference to the Department's interpretation of a statute that it is tasked with enforcing." *Nuleaf CV Dispensary, LLC V. State Dep't of Health & Human Servs., Div. of Publ. & Behavioral Health*, 134 Nev. Adv. Op. 17, 414 P.3d 305, 311 (2018). Here, the district court failed to grant the Department "great deference" in interpreting NRS Chapter 453D, because it erroneously believes that the Department does not have any deference to interpret statutes passed *by voter initiative*. The district court explicitly based its order granting preliminary injunction on that erroneous contention, and that order should be reversed.

The district court cites Article 19, section 2, clause 3 of the Nevada Constitution—which states that "[a]n initiative measure ... shall not be amended ... by the legislature within 3 years from the date it takes effect"—as basis for preventing the Department from adopting regulations that implement the Department's interpretation of NRS Chapter 453D. For the district court, Article

19's language stating a legislature may not amend a statute passed by voter initiative would make such statutes sacrosanct, such that regulations passed by the Department could not interpret the scope or application of the statute in any way. In other words, the district court viewed Article 19 as somehow negating the deference courts typically afford agency interpretations any time a voter initiative is involved.

But Article 19 is not even relevant to this case and certainly does not eliminate agency deference, as the district court believed. Article 19 only addresses amendments passed **by the legislature**. It never even mentions agencies or agency deference. There is no reason to presume that Article 19 alters agency deference in any way, as agencies have never had the power to modify or amend statutes, *See*, *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997).

This Court has never held or even suggested that agencies have less deference in interpreting statutes passed by voter initiative than they have in interpreting statutes passed by the legislature. During the evidentiary hearing on the motion for preliminary injunction, the district court went so far as to ask for pocket briefs on the difference in an agency's deference in adopting regulations "related to an initiative petition, as opposed to legislation ... given the limits of Article 19." Judge Gonzalez admitted that she had already "looked [and] couldn't find anything," so she was asking the parties to provide any additional authority

that they could find on the issue. (34 AA 008276-008277). Unsurprisingly, the parties' pocket briefs did not present any authority stating that the two types of statute should be treated differently, because there was no such authority. There is no logical reason to treat the two types of statutes any differently. The duties of agencies are the same no matter how the statutes they are tasked with interpreting were passed.

The district court made a reversible error in failing to grant the Department deference merely because the Department was interpreting a statute passed by voter initiative. The statute required the Department to conduct a "background check" (a term which is not even defined in the statute) of "each prospective owner" (another ambiguous term not defined in the statute), but in carrying out this process, the Department was permitted to determine the most appropriate method of implementation. In passing the 5% rule, the Department interpreted the terms of the statute to determine exactly what the statute required. It followed the existing regulation both in medical marijuana and in other highly regulated industries to clarify exactly who should be subject to background checks. It did not modify the statute or amend it.

The district court did not properly approach the question at issue. Instead of asking whether the requirements of NAC 453D.255(1) were an acceptable interpretation of NRS 453D.200(6), the court began with the false assumption that

the regulation automatically acted as an amendment or "deviation" from the statute. Under such an assumption, the regulation had no chance. The district court's erroneous view resulted in an improper finding that the Department violated Article 19 of the Nevada Constitution. The district court's error tainted the entire evaluation of the preliminary injunction, and a reversal of the injunction is now necessary.

2. The Department Properly Interpreted NRS 453D.200(6)

The 5% rule was a proper interpretation of the background check mandate in NRS 453D.200(6), which provides for "public safety" by requiring that "business owners are subject to a review by the State of Nevada to confirm that the business owners . . . are suitable to produce or sell marijuana." NRS 453D.020(1), (3). The 5% ownership rule was permitted under NRS 453D.200(1), which requires the Department to "adopt all regulations **necessary or convenient** to carry out the provisions of" NRS 453D. As interpreted by the Department, and consistent with ongoing practice, the 5% rule would allow the Department to background check all owners that may have meaningful influence on the company while not requiring background checks on insignificant, nominal shareholders of publicly traded companies. In striking down that interpretation, the district court came to an improper legal conclusion.

In rejecting the Department's interpretation of NRS 453D.200(6) and in asserting its own interpretation, the district court failed to consider that the "leading rule of statutory construction is to ascertain the intent of the legislature [or in this case the voters] in enacting the statute." *Dezzani v. Kern & Associates*, Ltd., 412 P.3d 56, 59 (Nev. 2018) (quoting *McKay v. Bd. of Supervisors of Carson City,* 102 Nev. 644, 650, 730 P.2d 438, 443 (1986)). That means looking past the plain language of the statute "when the result it apparently decrees is difficult to fathom or where it seems inconsistent with [the voters'] intention." *Pub. Citizen v. U.S. Dept. of J.*, 491 U.S. 440, 454–55 (1989) (quoting *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48 (1928)).[8] This Court has specifically stated that *even if a statute is unambiguous on its face,* a literal interpretation of a statute may not be imposed when such an interpretation (1) would lead to unreasonable or absurd results, (2) does not harmonize with the broader statutory scheme, or (3)

[8] *See also*, *Seput v. Lacayo*, 134 P.3d 733, 735 (Nev. 2006) ("When statutory language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, **unless that meaning was clearly not intended**.") (emphasis added); *State v. Quinn*, 30 P.3d 1117, 1120 (Nev. 2001) ("If the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, **unless it is clear that this meaning was not intended**.") (emphasis added); *State v. State of Nevada Employees Ass'n, Inc.*, 720 P.2d 697, 699 (Nev. 1986) ("When a statute uses words which have a definite and plain meaning, the words will retain that meaning **unless it clearly appears that such meaning was not so intended**.") (emphasis added)

goes against public policy and the general spirit of the law.[9] The district court's interpretation of NRS 453D.200(6) embodies all three of those problems, while the Department's interpretation resolves each of those problems. The district court should have deferred to the Department.

i. The District Court's Interpretation of NRS 453D.200(6) Leads to Absurd and Unreasonable Results

Among the canons of statutory construction, this Court has consistently held that interpretation of statutes should ***always*** avoid unreasonable or absurd results. *State v. White*, 330 P.3d 482, 484 (Nev. 2014). This remains true even if it means departing from the plain language of the statute.[10] In this case, the language of

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[9] *See*, *e.g. Dezzani*, 412 P.3d at 59 (quoting *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) ("[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent."); *In re CityCenter Constr. & Lien Master Litig.*, 310 P.3d 574, 580 (Nev. 2013) (citations omitted) ("We interpret statutes to conform[ ] to reason and public policy. In so doing, we avoid interpretations that lead to absurd results. Whenever possible, [we] will interpret a rule or statute in harmony with other rules or statutes.")

[10] *See*, *Newell v. State*, 364 P.3d 602, 603–04 (Nev. 2015) ("[W]hen the 'literal, plain meaning interpretation' leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning."). *See also*, *Dezzani*, 412 P.3d at 59; *In re CityCenter*, 310 P.3d at 580; *Rural Tel. Co. v. Pub. Utilities Commn.*, 398 P.3d 909, 911 (Nev. 2017); *Pub. Employees' Ret. System of Nevada v. Gitter*, 393 P.3d 673, 679 (Nev. 2017); *State v. Harris*, 355 P.3d 791, 792 (Nev. 2015); *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 918 (Nev. 2010); *Fierle v. Perez*, 219 P.3d 906, 910–11 (Nev. 2009).

NRS 453D.200(6) is ambiguous, and the district court chose to interpret the statute in a way that leads to absurd results. The district court's interpretation of the mandate to conduct background checks on "each prospective owner" of a marijuana applicant as requiring background checks of each individual stockholder of the applicant, no matter how small of a share of the company the stockholder owns, would result in an absurd and impossible mandate, both on the Department and on all affected applicants.

Interpreted in its most literal sense, NRS 453D.200(6) would require a background check on every stockholder of every publicly held company every time a stock trades hands on the open market, a result so bizarre that even the district court rejected it. The district court instead suggested that perhaps the Department could set a "record date" to conduct all background checks on shareholders at a single point in time. (46 AA 011367). The statute, of course, provides for no such process, and by suggesting such a process, the district court confirms the need for additional regulatory guidance as to the definition of "owner" in Ballot Question 2. Paradoxically, the district court rejected the Department's reasonable interpretation in favor of rigid adherence to the text (reading "each prospective owner" literally), while simultaneously creating its own interpretation (the Department could set a "record date" for owners) that is found nowhere in Ballot Question 2 or other relevant statutes. *This is the very reason for administrative discretion*.

The district court's interpretation is nearly as absurd as the most literal interpretation. Publicly traded companies often have thousands of shareholders, a majority of whom hold minuscule portions of stock not in their own names, but in mutual funds or other "street names" (*i.e.,* stock held in a broker name, such as Merrill Lynch or Charles Schwab). Discovering and background checking all actual owners even on a "record date"—let alone on an ongoing basis—would, as a practical matter, be impossible and ineffective, and employees of the Department testified that it would be impossible. (*See*, *e.g.* AA 008676:23-008677:3).

For an example of what this looks like, Mark Bradley Feldgreber the principal of Green Leaf Farms, **one of the Unsuccessful Applicants testified** that Green Leaf Farms was owned by a company that had 9,000 shareholders—an estimated 55% of which were owned in "street name," which is typically the broker's name, such as Merrill Lynch or Charles Schwab. This is a standard practice to permit ease of trading. He further testified that simply *identifying* the actual names of those 5,000 shareholders would be extremely complicated, as is common with any publicly traded company. It is no wonder Mr. Feldgreber testified that he adamantly believed the 5% rule to be reasonable and necessary. (43 AA 010681-010684).

As a further example of the absurdity of the district court's interpretation, if a retiree in Canada had a few dollars invested in a mutual fund that owned a few

shares of public company stock on a purported "record date," she would be required to fill out a fingerprint card from the State of Nevada to see if she had any "excludable felonies" as one of the "prospective owners" of a marijuana establishment owned by a publicly traded company. This burdensome process would be required under the district court's literal interpretation, even if this individual were unaware of the specifics of her mutual fund investment or had never even heard of the marijuana establishment. Such a "prospective owner" certainly would have no ability to govern or direct the actions of the marijuana establishment, nor could there be any viable concerns with this passive owner's influence on the establishment's actions or activities.

Even if the Department were somehow able to complete the herculean task of conducting a background check of every single owner of an applicant within the mandatory 90-day application period promulgated by NRS 453D.210(4), such background checks would be meaningless. Within a week, the landscape of public stockholders could be materially different as stocks are bought and sold on the open market on a daily basis. The Department could not actually address any public safety concerns, as criminals could easily skirt a record date via options, warrants, or other indirect ownership rights. An interpretation of NRS 453D.200(6) that would require such costly, virtually impossible, and such a form of

meaningless background checks is a textbook example of absurdity that Nevada voters did not intend or demand.

The 5% rule was designed to avoid these results. It ensures that background checks will be conducted on the owners who may have **actual influence** on the operation of the applicant establishments without getting bogged down in meaningless background checks that the Department is not equipped to conduct. The Department, faced with ambiguity with respect to the undefined term "prospective owner," adopted the 5% rule to ensure public safety while simultaneously balancing the practicalities of the purpose of background checks themselves. In doing so, the Department reasonably adopted a regulation that was already valid and functioning properly in the context of medical marijuana and would satisfy any concerns regarding the voters' actual intent in approving the sale of recreational marijuana.

ii. The Court's Literal Interpretation of NRS 453D.200(6) Violates the Statutory Scheme and Spirit of the Law

The strict interpretation of NRS 453D.200(6) suggested by the district court would create an impossibility that would serve to bar all publicly traded companies from obtaining recreational marijuana establishment licenses. If the voters had intended to bar publicly traded companies from applying for licenses, "surely [they] would have expressed it in straight forward English." *FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (J. Stevens, dissenting). There is no such

provision in the statute, which does not so much as reference public ownership. Given that numerous public companies currently operate in the State's medical and recreational marijuana industry, imposing such a subsequent bar would be improper.

The same statute that mandates background checks also requires the Department to adopt regulations that "**must not prohibit** the operation of marijuana establishments, either expressly **or through regulations that make their operation unreasonably impracticable**." NRS 453D.200(1). Additionally, the spirit of the law created by NRS 453D attempts to balance the goals of: (1) making recreational marijuana available to the public and **regulated similar to other legal businesses**, especially those involved in the sale of alcohol and (2) protecting the public's health and safety. *See*, NRS 453D.020.

It would be bizarre to regulate ownership of medical marijuana establishments one way, and recreational marijuana completely differently, especially when an applicant is first required to have a medical marijuana license in order to apply for a recreational license. But this is exactly what the court has imposed, even when these two regulations are identical:

Medical – NAC 453A.302(1):	**Recreational** – NAC 453D.255(1):
Except as otherwise required in subsection 2, the requirements of this chapter concerning owners of *medical* marijuana establishments only apply to a person with an aggregate ownership interest of 5 percent or more in a *medical* marijuana establishment.	Except as otherwise required in subsection 2, the requirements of this chapter concerning owners of marijuana establishments only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment.

Nevada's gaming regulations provide similar 5% ownership thresholds for licensing. For gaming industry partnerships, "every general partner of, and every limited partner with **more than a 5 percent ownership interest** in, a limited partnership which holds a state gaming license…" is required to be licensed. NRS 463.569(1). For limited liability companies, members "with **more than a 5 percent ownership interest** in a limited-liability company" must be licensed. NRS 463.5735(1). The gaming statutes also impose suitability requirements on persons who own "**more than 5 percent of any class of voting securities** of a publicly traded corporation registered with the Nevada Gaming Commission." NRS 463.643(3). The gaming statutes even define a "covered person" for suitability as someone who "with respect to ownership…**hold[s] 5 percent or more of the entity**…or any amount of ownership that **provides control** over the

entity…". NRS 463.014645(2)(b). Far from "arbitrary and capricious," the 5% rule has been part of the regulatory structure for Nevada's most notable industry—gaming—long before marijuana was legalized.

This same type of ownership threshold is applied in federal securities regulation, as Section 13(d) of the Securities Exchange Act of 1934 requires owners of "more than **five per centum** of any security of a class described" to file a statement of ownership with the Securities and Exchange Commission. 15 U.S.C. §78m(d)(1). The purpose of this rule is to provide information regarding those who may "exercise control over the Company," and the five percent threshold has been deemed to be the line for determining ownership that may have some measure of control. *See Schaffer v. CC Investments, LDC*, 153 F. Supp. 2d 484, 485 (S.D.N.Y. 2001).

Remarkably, the Nevada Rules of Appellate Procedure adopt this same type of limitation on ownership, as NRAP 26.1(a) includes an express limitation that parties need only list "any publicly held company **that owns 10% or more of the party's stock**" in its disclosure! This Court is thus entirely familiar with rules setting ownership thresholds based on the ability or inability of shareholders with different levels of ownership.

Former Department Director Deonne Contine explained that the 5% rule "is similar to how we treat liquor and – how the Department treated liquor applicants.

Because there's recognition in the liquor context that pretty much every liquor wholesaler has some public component. So there's not this ability to have every single entity that has some small piece of ownership reviewed, essentially." (41 AA 010108:24-010109:5). With NRS 453D.020(3) expressly stating that "marijuana should be regulated in a manner similar to alcohol," there is certainly no expression by the voters or any other indication that publicly traded companies should be banned entirely from an industry due to the impossibility of conducting background checks on minor shareholders, while permitting other industries such as alcohol or gaming to adopt 5% ownership limitations.

In fact, there is a reason that some of the primary marijuana establishments in the State are owned by publicly traded companies: the safest, best-organized, and most self-sufficient operators are more attractive acquisitions for public companies, and these establishments provide the most tax revenue to the state through their successful operations. Public companies, moreover, have more fulsome disclosure requirements under applicable securities laws. Nevada voters certainly did not intend to preclude these companies from operating. Had they intended to do so, it should have been explicitly stated in the statute.

Construing NRS 453D.200(6) to require an impossible process of background checks on nominal shareholders does not harmonize with the rest of NRS Chapter 453D and goes against the spirit of the law. Accordingly, the district

court's reliance upon this provision as the basis for its preliminary injunction should be overturned and the injunction set aside.

3. The Unsuccessful Applicants Lacked Standing to Challenge the Implementation of NRS 453D.200(6)

The Unsuccessful Applicants also are not likely to succeed on the merits of any claim challenging the implementation of NRS 453D.200(6) because they lack standing to bring any such claims. To have standing to bring a claim, "there [must] be a causal connection between the injury and the conduct complained of," and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Miller v. Ignacio*, 921 P.2d 882, 885 n. 4 (Nev. 1996) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992)). The Unsuccessful Applicants contend that they were injured because they did not receive any licenses, but there is no causal connection between that injury and any failure to implement NRS 453D.200(6).

The background check mandate is designed to protect the public by allowing the Department to review business owners "to confirm that the business owners…are suitable to produce or sell marijuana." NRS 453D.020(3). The only theoretical injury that a party can suffer for the Department's failure to implement that statute is an injury to public safety. The Unsuccessful Applicants could not have been injured for any violation of NRS 453D.200(6) that is not common to the

public as a whole, and injury common to the public is not sufficient to create standing. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016).[11]

Even if implementation of the law could have inadvertently affected the competition for licenses, parties cannot sue for an injury the law was not designed to protect.[12] There is no evidence here, however, that the implementation of the law would have inadvertently affected the competition. If extensive background checks had revealed a problem with any Successful Applicant's owners, officers, or board members, NAC 453D.272 expressly provides an opportunity for the applicant to revise its application to remedy any issue with an owner, officer, or board member who might not qualify to serve in this capacity. Thus, any claim of potential injury to Unsuccessful Applicants would be entirely speculative. The preliminary injunction is based on a claim brought without standing and should be reversed.

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[11] There are narrow exceptions to the general rule that a party cannot bring suit for a public injury, but those exceptions do not apply here. In order to bring such a suit, the party filing the suit must be an "appropriate" party to represent the public interest, *see*, *Id.*, but the Unsuccessful Applicants, as parties that are currently taking advantage of the 5% rule and are only interested in obtaining licenses, are not appropriate parties to bring such a suit. Besides, the Unsuccessful Applicants never even brought any causes of action claiming injury to the public health.

[12] *See*, *e.g. Hauer v. BRDD of Indiana, Inc.*, 654 N.E.2d 316, 319 (Ind. App. 1995) (holding that a fireworks dealer has no standing to challenge the allocation of a license to a competitor because "[t]he laws are not designed to protect the market share of fireworks dealers, and nothing within the statutory framework of the fireworks laws establishes any right to sales exclusivity or affords any protection from competition").

4. The Unsuccessful Applicants Should Have Been Estopped from Challenging the 5% Rule

The very first representative of the Unsuccessful Applicants to question the validity of the 5% rule at the evidentiary hearing was John Ritter of TGIG, LLC. (30 AA007476-007477). Remarkably, Mr. Ritter was one of the sponsors of the Governor's Task Force working group that **first proposed the 5% rule** to the Department. Moreover, several of the Unsuccessful Applicants, including MM Development and Serenity Wellness, are public companies that rely upon the 5% rule to currently operate. Even the Unsuccessful Applicants that are not public entities knew about the 5% rule well before the application process began. They never raised an issue, much less challenged it, at the time of application submission, and none mention it in their complaints in this case.

The Unsuccessful Applicants should have been precluded from pursuing these claims by several legal doctrines, including laches, which prevents a party from bringing a claim when its delay in bringing the claim constitutes acquiescence to the condition the party is challenging and the delay was prejudicial to others, *Miller v. Burk*, 188 P.3d 1112, 1125 (Nev. 2008), and equitable estoppel, which "functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *In re Harrison Living Tr.*, 112 P.3d 1058, 1061–62 (Nev. 2005).

The Unsuccessful Applicants were fully aware of the 5% rule at the time they submitted their applications, but the Department—which expended significant resources evaluating the applications—is now forced to defend a regulation that no one believed problematic until after the awards were announced. Both the applicants and the State of Nevada have expended considerable time, resources, and energy into furthering an industry the voters support, only to see delay caused by an issue that all were aware of at the time of submission. Such facts are the very reason why principles of equitable estoppel exist. Complaints about the 5% rule are not genuine. Rather, they represent an excuse to upset the process that did not benefit the Unsuccessful Applicants.

If the 5% rule were deemed invalid now, parties like NOR would suffer due to the Unsuccessful Applicants' failure to challenge the 5% rule before the application period. NOR transferred ownership to GGB, which was owned by the public company Xanthic, on September 4, 2019, just days before submitting its applications. (47 AA 011591-011592). Had it known that any party would question the Department's treatment of publicly traded companies, it would not have made the transfer before applications were submitted. It completed the transfer to ensure that the Department had full and complete information in considering the applications. Had it known of the district court's decision that public company acquisitions would somehow be permissible post-application but pre-award of

licenses, it could have waited three weeks to complete the transfer, so the Department would be kept in the dark regarding ownership until after conditional licenses were awarded. The current challenge to the 5% rule is not equitable, and the district court abused its discretion in failing to apply equity to prevent the Unsuccessful Applicants from challenging the 5% rule post hoc.

C. The District Court Abused its Discretion in Failing to Articulate Irreparable Harm, but Rather Assuming It May Exist

Nowhere in any of the 24 pages of the FFCL does the district court ever hold that the Unsuccessful Applicants would suffer irreparable harm if the injunction were not granted, let alone actually explain the purported irreparable harm. This Court has previously held that in granting preliminary injunctions, "the **irreparable harm must be articulated in specific terms** by the issuing order or be sufficiently apparent elsewhere in the record," *Dept. of Conservation and Nat. Resources, Div. of Water Resources v. Foley*, 109 P.3d 760, 762 (Nev. 2005) (emphasis added). The district court abused its discretion in failing to articulate as much.

The closest the district court comes to discussing irreparable harm in the FFCL is to cite *City of Sparks v. Sparks Mun. Court*, 302 P.3d 1118, 1124 (Nev. 2013) stating "a constitutional violation may, by itself, be sufficient to constitute irreparable harm." The district court, however, does nothing to elaborate on how that case applies in this matter. Apparently, it thought that because it was holding

that the Department violated Article 19 of the Nevada Constitution, irreparable harm should have been implied. There are two problems to that approach. First, the district court was mistaken to hold that Department could have violated Article 19, and no constitutional violation is even at issue here. Second, even if such a constitutional violation were at issue, the *Sparks* case, by electing to use the word "may" does not indicate that irreparable harm should automatically be implied any time a constitutional violation is at issue. The court still was required to articulate that harm, which it failed to do.

The court likely did not articulate any harm because there is no harm to articulate. The only activity the FFCL practically enjoins is NOR's ability to open for business, and NOR's ability to open its stores during the litigation does not harm the Unsuccessful Applicants in any way. The only harm the Unsuccessful Applicants have ever raised is a vague potential loss of "market share." Such harm is not "(a) concrete and particularized; [or] (b) actual or imminent" as required to support a preliminary injunction. *Hajro v. U.S. Citizenship and Immig. Services*, 811 F.3d 1086, 1102 (9th Cir. 2016).

The licensing laws in NRS 453D—and specifically the background check requirement—are not designed to protect licensees from competition. The laws cannot, therefore, be used as a basis to establish competition-based claims, and the loss of market share is not an addressable injury that can form the basis of

irreparable harm. *See*, *e.g. Hauer v. BRDD of Indiana, Inc.*, 654 N.E.2d 316, 319 (Ind. App. 1995). Moreover, no evidence of the loss of market share was ever even presented in the evidentiary hearing, leaving any such argument as conjectural, hypothetical, and insufficient to form irreparable harm. Therefore, the district court abused its discretion in assuming irreparable harm in this case.

D. The District Court Arbitrarily and Capriciously Applied the Injunction

Even if the district court had properly found that a preliminary injunction is justified, the process it used to create the parameters of the injunction by asking the AG to make a list of "[w]hich successful applicants completed the application in compliance with NRS 453D.200(6)" and then relying entirely on that list, (46 AA 011329-011330), resulted in an injunction that arbitrarily singled out NOR and other successful applicants. To this day, NOR is unsure why it is enjoined. It disclosed *all* of its owners, and it does not know why it has been treated differently than other Successful Applicants, such as the Essence entities, that are in the same position as NOR. The district court abused its discretion in arbitrarily applying the preliminary injunction, and the injunction should be reversed.

1. NOR Disclosed All of Its Owners and Should Not Be Enjoined

NOR is a limited liability company made up of its members, per NRS Chapter 86. Its application listed 100% of its owner members providing full disclosure for the Department to conduct all necessary background checks. The

AG ambiguously contends that it placed NOR in Tier 3, because NOR may not have listed every shareholder of a parent company in its applications, but those shareholders are irrelevant to the analysis. They are not *members* of NOR and are not NOR's "owners" as the Department has always understood the word.

In order to make the shareholders of Xanthic relevant for the preliminary injunction, the district court would need to find that the Department's interpretation of the word "owner" was improper, that under NRS 453D.200(6), the term "owner" could not be defined as members of an LLC—be they persons or entities—but must also include the owners of those members and the owners of those owners, all the way down to the last individual. The court never found as much, and it never struck down the Department's definition of the word "owner." Had it tried, NOR would be before this Court arguing that the Department had great deference to define the word "owner". The Department's regulations state that for limited liability companies such as NOR, the persons that "must comply with the provisions [in NRS 453D] governing **owners**" are "the **members** of the limited-liability company." NAC 453D.250(2).[13] NOR's members do *not* include

[13] Steve Gilbert of the Department confirmed that the Department determined owners based on the statute, which provided that owners are defined for each entity: "Corporations are officers, partnerships are partners, and are members." The transcript left a blank space for "LLC", but this was the statement made during the hearing and reflects the terms of the applicable regulation. See, 33 AA 008233-008236.

Xanthic or its shareholders. Therefore, those shareholders would have only been relevant to the AG's analysis if the district court had struck down the Department's definition of "owner," but the court never addressed that issue.

There is no nexus between the district court's actual findings in the FFCL and the injunction targeting NOR. By effectively enjoining NOR without further explanation, the district court abused its discretion, and the injunction should be set aside.

2. The Court Had No Reason to Subject NOR and Other Successful Applicants to the Injunction but Exclude Other Parties

There are other Successful Applicants that are owned by publicly traded companies yet are not subject to the Injunction. The Essence entities, for example, are owned by publicly traded GTI, Inc., yet are not subject to the injunction and are able to open for business. The only difference between NOR and those entities is the timing of the transfer of ownership. Since the Essence entities did not transfer ownership to a publicly traded company until after the application process started, there is, in the district court's mind, no requirement for them to disclose all of the shareholders of the public entities. Had NOR only waited a few days to transfer ownership, it would not be subject to the Injunction.

Perhaps more egregious is the treatment of several Successful Applicants that did not intervene in the licensing cases and are not subject to the injunction on the Department. The AG placed these entities in Tier 1 without conducting *any*

substantive review, instead relying solely on the attestations provided at the time of application. In essence, these entities were given a free ride. NOR was not afforded such treatment. Apparently, the reward for NOR's decision to intervene in the matter, defend its rights, and assist the state of Nevada in defending its process is to be saddled with a nebulous injunction despite full compliance with Ballot Question 2 and Department guidance.

There is no valid, legally viable reason for the district court or the AG to treat NOR any differently than it is treating these other parties. If NRS 453D.200(6) requires background checks on all of NOR's owners, it requires background checks on *every entity's owners* irrespective of time. NOR is being punished for applying for licenses under its true ownership and for protecting its legal rights, which undermines the very tenets of equity.

VIII. CONCLUSION

The district court erred in granting the injunction in this case. The Unsuccessful Applicants are not likely to succeed on a claim that the Department improperly interpreted NRS 453D.200(6), and no irreparable harm has ever been articulated. Nor do the Unsuccessful Applicants have standing to bring a claim regarding NAC 453D.255(1). Moreover, the district court acted arbitrarily and capriciously in determining the application and scope of the injunction.

Accordingly, this Court should reverse the injunction so Department may complete final inspections on recipients of conditional recreational marijuana licenses.

Dated this 13th day of January, 2020

/s/ David R. Koch
David R. Koch
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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. 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 (a)(6) because: This brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. 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 type face of 14 points and contains 10,809 words.

3. Finally, I hereby certify that I have read this Opening 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

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sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated: January 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT NEVADA ORGANIC REMEDIES, LLC'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 17th day of January, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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