Case No. 79669

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.

THE STATE OF NEVADA DEPARTMENT OF TAXATION

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. A-19-787004-B

THE STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION'S ANSWERING BRIEF

AARON D. FORD
Nevada Attorney General
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Respondent
The State of Nevada, Department of Taxation

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND REGULATIONS

OTHER AUTHORITY

I. INTRODUCTION

The District Court erred by imposing an unreasonable interpretation onto the Regulation and Taxation of Marijuana Act's (Question 2) prospective background check provision. Nothing in Question 2 prohibited the DOT from accepting applications that did not disclose every single person who held an infinitesimal percentage of ownership in an applicant. To be sure, an initiative cannot be amended, annulled, repealed, set aside or suspended for 3 years, but that is not what NAC 453D.255(1) does. By requiring the disclosure in the application of owners above a 5% threshold, the regulation is a reasonable administrative implementation of Question 2's ambiguous text that thoughtfully balances the voters' goal of public safety without imposing an unreasonable burden on a nascent industry to regulate it out of existence.

The Department of Taxation agrees with Greenmart of Nevada. The District Court abused its discretion in granting preliminary injunctive relief.

II. STATEMENT OF JURISDICTION

The DOT agrees with Greenmart's jurisdictional statement.

III. STATEMENT OF THE ISSUES

1. Whether the District Court erred in characterizing NAC 453D.255(1)'s common-sense 5% percent provision as an unconstitutional amendment of Question 2's background check provision?

2. Whether the District Court erred by concluding that every putative constitutional violation, regardless of any nexus to an injury to the moving party, meets the irreparable harm requirement for preliminary injunctive relief?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates Article 19, section 3 of the Nevada Constitution. This provision provides, in relevant part, that "[a]n initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect." Nev. Const. Art. 19, § 3.

The application process for retail marijuana establishments during the relevant period of this case was only open to "persons holding a medical marijuana establishment registration certificate under Chapter 453A of NRS." NRS 453D.210(2). Under 453A, the DOT may conduct a background check of any "medical marijuana establishment agent." NRS

453A.332(4). A medical marijuana establishment agent includes an "owner." NRS 453A.117. However, nowhere in Chapter 453A is the term "owner" defined.

Question 2 provided, "[t]he [DOT] shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6). But subsection (6) has nothing to do with approval or denial of an applicant in the *application process*, as subsection (2) explains: "The [DOT] shall approve or deny applications for licenses pursuant to NRS 453D.210." NRS 453D.200(2).

The following provisions of the Nevada Administrative Code are pertinent. NAC 453D.255(1) provides,

> 1. Except as otherwise required in subsection 2, the requirements of this chapter concerning owners of marijuana establishments only apply to a person with an aggregate ownership interest of 5 percent or more in a marijuana establishment.
>
> 2. If, in the judgment of the Department, the public interest will be served by requiring any owner with an ownership interest of less than 5 percent in a marijuana establishment to comply with any provisions of this chapter concerning owners of marijuana establishments, the Department will notify that owner and he or she must comply with those provisions.

V. STATEMENT OF THE CASE

Nevada overwhelmingly voted to approve Question 2. The voters wanted to legalize retail marijuana, but no voter could think they were also voting on how to regulate retail marijuana. This distinction, which the District Court ignored, is made clear in the ballot materials and the text of the initiative.

A. The ballot materials did not dictate how the DOT should implement Question 2's administrative details.

The initiative to legalize recreational marijuana, Question 2, went to the voters in 2016. The ballot materials for Question 2 described its purpose as the amendment of the Nevada Revised Statutes as follows:

> Shall the *Nevada Revised Statutes* be amended to allow a person, 21 years old or older, to purchase, cultivate, possess, or consume a certain amount of marijuana or concentrated marijuana, as well as manufacture, possess, use, transport, purchase, distribute, or sell marijuana paraphernalia; impose a 15 percent excise tax on wholesale sales of marijuana; require the regulation and licensing of marijuana cultivators, testing facilities, distributors, suppliers, and retailers; and provide for certain criminal penalties?

AA 004742. The initiative's ballot materials inform the voters through the question that they are voting on a policy choice to legalize recreational marijuana in Nevada, but gave no indication that by voting

for the initiative they are prescribing the administrative details, or rules, for how recreational marijuana shall be regulated by the Department of Taxation.

As the voter reads further into the ballot pamphlet, the ballot materials described the Department of Taxation's regulatory role. The Department of Taxation, "[i]n addition to licensing," was to adopt "regulations necessary to carry out the provisions of this ballot measure." AA 004743. These regulations "must" address, in relevant part, "licensing procedures" and "licensee qualifications." *Id*. The ballot materials left the definition of licensing procedures, the definition of qualifications, and the rules by which such definitions would be developed through regulation to the Department of Taxation.

B. The drafters of Question 2 enshrined regulatory flexibility into the initiative's provisions.

The text of Question 2 made clear that public health and safety was a key reason for the initiative. This is made clear in the "findings and declarations" section of the initiative. NRS 453D.020(1). To that end, "[b]usiness owners are subject to a review by the State of Nevada to confirm that the business owners and the business location are suitable to produce or sell marijuana[.]" NRS 453D.020(3)(b). Importantly, the

initiative did not dictate how suitability was to be determined, when it was to be determined, and the level of ownership to which suitability determinations would apply.

Consistent with 453D.020(3)(b)'s non-specific goal of public health and safety, the initiative provided for background checks. NRS 453D.200(6) provides, "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." Like other health and safety provisions of the initiative, subsection 6 made no attempt to define "owner" or "prospective."

The initiative authors' lack of specificity was intentional. They gave the DOT broad rule-making power, providing that "the [DOT] shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." 453D.200(1). Ms. Deborah Azzi, one of the initiative's drafters stated:

> Our intent was to give the regulator authority to regulate the cannabis industry. We used language that was consistent with language already used in Nevada Revised States to grant rule making authority to various agencies or departments for other regulatory purposes.

AA 004887.

C. The District Court enjoined the DOT despite a total lack of evidence that NAC 453D.255(1) caused any Plaintiff an injury, let alone irreparable harm.

The Serenity group of plaintiffs moved for preliminary injunctive relief on a litany of grounds. AA 000771-73. Serenity complains that the DOT did not conduct a background check of all owners of applicants who were publicly trade companies. AA 000772. As Greenmart points out, Serenity's allegation is bizarre, considering Serenity was a publicly traded company at the time of the application. Br. at 9.

Because Serenity and the other plaintiffs could not plausibly claim that they were harmed by the DOT's promulgation of the 5% provision, they elided this essential requirement for injunctive relief. The Serenity Plaintiffs merely wrote that a constitutional violation "may, by itself," amount to irreparable harm. AA 000813.

The District Court initially noted that "[p]laintiffs have the burden to demonstrate that the [DOT's] conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an adequate remedy." AA 005294. But the District Court never explained how the DOT's enactment of the 5% provision had caused any harm to

Plaintiffs, let alone irreparable harm that would be difficult to remedy. AA 005298 at para 85.

The District Court then rewrote NRS 453D.200(6) to find that the DOT violated the initiative. The District Court wrote that the DOT was required to compel all applicants to disclose on their application persons owning less than 5% and to conduct a background check on such persons. AA 005298 at para. 82. The initiative's language merely says the DOT has to conduct background checks on "prospective" owners without saying when that process had to occur, let alone commanding that such checks occur prior to a conditional licensure.

VI. STANDARD OF REVIEW

Greenmart correctly described the standard of review.

VII. SUMMARY OF ARGUMENT

The District Court correctly identified the standards for granting a preliminary injunction, but then no made attempt to apply them to the Serenity Plaintiffs' dubious argument that the 5% percent regulation was an impermissible amendment of Question 2's prospective owner background check provision, NRS 453D.200(6).

The District Court's analysis of NRS 453D.200(6) fell short of this Court's interpretive guidance on initiatives, which require analysis of an initiative's text, but also the ballot information to determine voter intent. The District Court ignored both of these interpretive principles in favor of a wholesale rewriting of the 453D.200(6) to require background checks of all owners (no matter how infinitesimal their equity interest and no matter how short the duration of their ownership) of all applicants, regardless of whether they were successful or not. Because nothing in the text or the ballot materials supports the District Court's draconian view, the District Court's preliminary injunction order should be vacated.

The District Court's order also lacks any analysis of the irreparable injury requirement. To be sure, a constitutional injury "may" count as irreparable harm. But the District Court simply concluded that one existed here without even the paltriest effort on Plaintiffs' part to demonstrate that *they* have one. The District Court's order violates the requirement that a moving party demonstrate "a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is in inadequate remedy. *S.O.C., Inc. v. The Mirage Casino–Hotel,* 117 Nev. 403, 407, 23

P.3d 243, 246 (2001). This Court has never retreated from requiring a causal nexus between the non-moving party's conduct and the threat of imminent harm to the moving party.

VIII. ARGUMENT

A. NAC 453D.255(1) is wholly consistent with NRS 453D.200(6)'s text and the voters' intent in passing Question 2.

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." *In re Lance W.*, 694 P.2d 734, 889 (Cal. 1985). The starting point for interpretation is a statute's language. *Robert E. v. Justice Ct.,* 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). If the statute's meaning is clear from the language actually used, then the court's inquiry is over. *Id.*

1. The background check is not a conditional license requirement.

The District Court erred by holding that the DOT was required to conduct a background check on each owner prior to the award of conditional licensure. Section 453D.200(6) requires the DOT to conduct a background check on each "prospective owner, officer, and board member" of an applicant. Contrary to the District Court's holding, there

is no language in the statute that ties the background check to the award of conditional licensure. The District Court may have thought a better statute would have included such a requirement. However, a court cannot under the guise of interpretation engage in policy making by rewriting a statute. *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.")

The District Court's interpretation also attributes an absurd purpose to the text of Question 2, which should be avoided. *See 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.") (internal quotations omitted)). There would be no reason to background check every conceivable owner prior to awarding conditional licenses because the application process was only open to existing medical marijuana licensees. NRS 453D.210(2). The plaintiffs produced no evidence at the

evidentiary hearing that any pre-existing medical marijuana agent (NRS 453A.117) was not background checked under 453A.332(4)(a).

The court's goal when interpreting statutory enactments is to harmonize the various provisions and avoid a clash between them. *Guinn v. Legislature of State of Nev.*, 119 Nev. 277, 285, 71 P.3d 1269, 1274–75 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). By artificially imposing a deadline on conducting a background check to conditional licensure, the District Court ignored section 453D.200(2), which says that the DOT is to approve or deny applications pursuant to NRS 453D.210.

2. The District Court's literal interpretation of "owner" lacks consistency with the surrounding language in the same statute and fails to give deference to the agency charged with implementing Question 2.

The District Court also erred by requiring a background check on every individual with an equity interest in an applicant, no matter how small and no matter the duration of ownership. The words "background check," "owner," and "prospective" are not defined in Question 2. The District Court literal interpretation the word owner, as every conceivable

equity holder in an applicant for no matter how short a period is not to be preferred.

At a minimum, NRS 453D.200(6) is ambiguous. Where a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous. *McKay v. Bd. of Supervisors,* 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). The word "owner" in subsection 6 appears in close proximity to the phrases "officer" and "board member," both of whom are persons with significant power to affect the affairs of a marijuana establishment. Thus, a reasonable alternative to the District Court's interpretation is that the initiative's drafters meant only owners having a similar ability, because of the size of their equity, to affect the marijuana establishment's business affairs.

The DOT's interpretation of subsection 6, which led to the creation of NAC 453D.255(1)'s 5% percent rule is by far the better interpretation. The DOT's interpretation is reasonable, convenient, and consistent with public safety. The testimony of Serenity's Chief Executive, Ben Sillitoe, explains why:

> Q. My question was does it matter who the owner is of that 60-cent investment during the time period to the public health and safety of Nevada.

A. I don't see how it would impact the public health and safety of Nevada.

AA 010562.

Not only does a state agency have the authority to interpret its controlling statutes, great deference should be given to an agency's statutory interpretation. *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (providing, "[w]hile not controlling, an agency's interpretation of a statute is persuasive." (citation omitted)). Applying this rule, an administrative construction of the language of the statute will not be readily disturbed by the courts. *Westergard v. Barnes*, 105 Nev. 830, 834, 784 P.2d 944, 947 (1989) (citation omitted). This Court should not set aside the DOT's reasonable interpretation of Question 2's ambiguous background check provision in favor of the District Court's unreasonable, literal interpretation that does not serve Question 2's purpose to create recreational marijuana regulations that are not unreasonable impracticable. *See generally* NRS 453D.200(1).

3. Nothing in the ballot materials circumscribed the DOT's discretion in implementing the initiative.

At the very minimum, NRS453D.200(6) is capable of at least 2 reasonable interpretations, and is therefore ambiguous, which warrants

a review of the ballot materials to determine voter intent. *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 63, 65–66, 128 P.3d 452, 460–61 (2006); *see also Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 467, 76 P.3d 22, 26 (2003).

The initiative's question to the voters set forth a policy choice on whether to have legal recreational marijuana in Nevada. AA 004742. The question gave no indication that by voting for the initiative, the voters were also proscribing the details, or rules, for how recreational marijuana shall be regulated by the Department of Taxation. *Id.* As the voter reads further, the DOT was to adopt "regulations necessary to carry out the provisions of this ballot measure." AA 004743; *see also* NRS 453D.200(1)("the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter"). Accordingly, the ballot materials demonstrate that the DOT was left with significant discretion in how to implement the initiative's broad purpose of legalizing retail marijuana.

"When determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." *State of Nev. ex. rel.*

Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (internal quotations omitted). The DOT's 5% rule for ownership, NAC 453D.255(1), is a reasonable interpretation of an ambiguous initiative provision.

Question 2 authorizes the DOT to adopt regulations that are "necessary or convenient" to implement the initiative. NRS 453D.200(1). Washington's initiative contained language authorizing the state liquor board to "adopt rules not inconsistent with the spirit of this act as are deemed necessary or advisable." Rev. Code. Wash. 69.50.342(1). Regulations passed pursuant to such a broad delegation of power are presumed to be valid and have been upheld. *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 406 P.3d 1199, 1218-19 (Wash. 2017). This Court should similarly approve the DOT's 5% ownership rule as a reasonable, convenient interpretation of an ambiguous initiative provision.

B. The District Court's order is inconsistent with this Court's irreparable harm jurisprudence.

Because Plaintiffs sought preliminary injunctive relief, they had the burden below of showing irreparable harm by providing testimony, exhibits, or documentary evidence to support its request for an

injunction. *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968).

But the Plaintiffs made no attempt to demonstrate irreparable harm that would result to *them* from the DOT's promulgation of the 5% background check rule. The District Court certainly made no such finding. Accordingly, Plaintiffs' sole argument for irreparable harm is that their so-called constitutional harm, *i.e.* amending the initiative within 3 years of its passage by the voters, necessarily equates to irreparable harm as a matter of law.

This Court's case law does not support a *per se* finding of irreparable harm whenever a constitutional violation is alleged. Such a *per se* rule ignores the causal nexus between the alleged injury and the conduct complained of by the moving party. *S.O.C., Inc.*, 117 Nev. at 407, 23 P.3d at 246. Under this rule, the non-moving party's conduct, if allowed to continue, will cause irreparable harm to the moving party before a trial on the merits. Nevada courts do not presume irreparable harm. *See e.g. Excellence Cmty. Mgmt, LLC v. Gilmore*, 131 Nev. 347, ____, 351 P.3d 720, 723 (2015).

This Court has also never indicated any support for such a *per se* rule. While the Court has cited to Ninth Circuit case law for the proposition that a constitutional harm "may, by itself," be irreparable harm, *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 357, 302 P.3d 1118, 1124-25 (2013) (citing *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir.1997)), the Ninth Circuit's pronouncement that constitutional injuries "often," but not always, suffice for irreparable injury arises from First Amendment case law. *See Ebel v. City of Corona,* 698 F.2d 390 (9th Cir.1983) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). To the extent such a presumption of irreparable harm has been expanded outside of the First Amendment context, *e.g. Am. Trucking Assoc. v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009), it is because the moving party faced a Hobson's choice of complying with unconstitutional law or losing the moving party's business.

Here, as Greenmart points out, the moving party itself—Serenity Wellness Center, LLC—did not disclose all of its owners. Serenity never articulated any argument that the DOT's 5% rule threatened it with irreparable harm. The purpose of the irreparable harm requirement is to protect and preserve rights for which there is no monetary

compensation that may be lost prior to a hearing on the merits. Because the DOT's 5% rule puts Plaintiffs in no such jeopardy, the District Court abused its discretion by finding that Plaintiffs met their burden to demonstrate irreparable harm.

IX. CONCLUSON

For these reasons, and those expressed by Nevada Organic Remedies, LLC and Greenmart, this Court should reverse and vacate the District Court's preliminary injunction order.

Dated this 4th day of June, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

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 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Century Schoolbook; or

□ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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 either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 3,458 words; or

□ Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

□ Does not exceed ___ pages.

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

Dated this 4th day of June, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski
Chief Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 4th day of June, 2020, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of
the office of the Nevada Attorney General