IN THE SUPREME COURT OF THE STATE OF NEVADA

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GREENMART OF NEVADA NLV LLC, A NEVADA LIMITED LIABILITY COMPANY; NEVADA ORGANIC REMEDIES, LLC,

Appellants,

vs.

ETW MANAGEMENT GROUP LLC, A NEVADA LIMITED LIABILITY COMPANY; GLOBAL HARMONY LLC, A NEVADA LIMITED LIABILITY COMPANY; GREEN LEAF FARMS HOLDINGS LLC, A NEVADA LIMITED LIABILITY COMPANY; HERBAL CHOICE INC., A NEVADA LIMITED LIABILITY COMPANY; JUST QUALITY, LLC, A NEVADA LIMITED LIABILITY COMPANY; LIBRA WELLNESS CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY; MOTHER HERB, INC., A NEVADA LIMITED LIABILITY COMPANY; GBS NEVADA PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; NEVCANN LLC, A NEVADA LIMITED LIABILITY COMPANY; RED EARTH LLC, A NEVADA LIMITED LIABILITY COMPANY; THC NEVADA LLC, A NEVADA LIMITED LIABILITY COMPANY; ZION GARDENS LLC, A NEVADA LIMITED LIABILITY COMPANY; and STATE OF NEVADA, DEPARTMENT OF TAXATION,[1]

Respondents.

ETW MANAGEMENT GROUP LLC, a

SUPREME COURT CASE NO. 79669

CASE NO.: A-19-787004-B
DEPT NO.: XI

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RESPONDENTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS APPEAL

[1] Appellants' caption failed to include GREEN THERAPEUTICS LLC, ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, and MMOF VEGAS RETAIL, INC. and incorrectly named MOTHER HERB, INC. and GBS NEVADA PARTNERS.

Docket 79669 Document 2020-22950

Nevada limited liability company; GLOBAL HARMONY LLC, a Nevada limited liability company; GREEN LEAF FARMS HOLDINGS LLC, a Nevada limited liability company; GREEN THERAPEUTICS LLC, a Nevada limited liability company; HERBAL CHOICE INC., a Nevada corporation; JUST QUALITY, LLC, a Nevada limited liability company; LIBRA WELLNESS CENTER, LLC, a Nevada limited liability company; ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, a Nevada corporation; NEVCANN LLC, a Nevada limited liability company; RED EARTH LLC, a Nevada limited liability company; THC NEVADA LLC, a Nevada limited liability company; ZION GARDENS LLC, a Nevada limited liability company; and MMOF VEGAS RETAIL, INC., a Nevada corporation,

Respondent/Cross-Appellants,

v.

STATE OF NEVADA, DEPARTMENT OF TAXATION, a Nevada administrative agency.

Respondent.

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Respondents' Answering Brief/Opening Brief on Cross Appeal[2]

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Adam K. Bult, Esq., Maximilien D. Fetaz, Esq., and Travis F. Chance, Esq. of the law firm Brownstein Hyatt Farber Schreck, LLP, and Adam R. Fulton, Esq. of the law firm Jennings and Fulton (collectively "BHFS").

[2]As an initial aside, Appellants filed Appellants' Appendix without any attempt to reach an agreement with Respondents regarding the filing of a Joint Appendix. Appellants' Appendix contains various extraneous documents across 47 volumes and is therefore bloated and cumbersome. For example, it includes numerous documents involving parties not subject to the appeal in Case No. 79669, including pleadings from Plaintiffs who are subject to cases outside of the instant appeal. As such, in an effort for clarity and for the convenience of this Court, Respondents file Respondents' Appendix, which is a mere 11 volumes and contains all the necessary documents to rule on the instant appeal and cross-appeal.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Respondent, ETW Management Group, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

2. Respondent, Global Harmony, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

3. Respondent, Herbal Choice, Inc., is a Nevada corporation that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

4. Respondent, Just Quality, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

5. Respondent, Libra Wellness Center, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

6. Respondent, Rombough Real Estate, Inc. dba Mother Herb, is a Nevada corporation that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

7. Respondent, THC Nevada, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

8. Respondent, Zion Gardens, LLC, is a Nevada limited liability company that is not publicly traded and has no parent corporation that owns 10% or more of the corporation's stock.

9. Respondent, MMOF Vegas Retail, Inc. is a NV Corporation, with the parent entities being MM Enterprises USA, LLC, MM CAN USA, Inc. and MedMen Enterprises, Inc. The publicly traded parent entity is MedMen Enterprises, Inc.

10. Adam K. Bult, Esq., Maximilien D. Fetaz, Esq., and Travis F. Chance, Esq., of Brownstein Hyatt Farber Schreck, LLP and Adam R. Fulton, Esq., of Jennings & Fulton, Ltd. are the attorneys that have or are expected to appear for the Respondents in this matter.

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I. JURISDICTIONAL STATEMENT.

ETW Plaintiffs do not dispute NOR's Jurisdictional Statement to the extent that this Court has direct jurisdiction and authority to hear this appeal under NRAP 3A(b)(3), which states that this Court has appellate jurisdiction over orders "granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction," despite the fact that such orders are ordinarily interlocutory in nature.

II. ROUTING STATEMENT

ETW Plaintiffs also do not dispute NOR's Routing Statement. Multiple subsections of NRAP 17(a) lead to the Supreme Court's presumptive retention of this case. As such, this case should be retained by the Supreme Court.

III. ISSUES ON APPEAL.

1. Whether the district court erred in holding that the Department went beyond the plain language of the enabling statute when it promulgated a regulation mandating background checks for only those owners who had a greater than 5% interest in the entity/applicant.

2. If the Department went beyond the scope of the statute in promulgating the 5% regulation, then was its interpretation entitled to deference by the district court.

3. Does the doctrine of laches bar the plaintiffs from seeking relief?

4. Did the district court abuse its discretion by enjoining NOR?

5. As presented on cross-appeal, did the district court err by holding that the Department could issue licenses to those applicants who failed to put a physical location on their application, despite the statutory and regulatory mandates that licenses can be issued only to those applicants that put a physical address on their applications.

IV. STATEMENT OF THE CASE.

Before commencing this appeal, Nevada Organic Remedies, LLC ("NOR") applied to the district court for a writ of mandamus ("NOR's Application for Mandamus"), but it was denied. *See* Respondent's Appendix ("RA"), Vol. XI, at 2002, Vol. XI, at 2057. NOR filed its Opening Brief in this matter on January 17, 2020, and April 15, 2020 ("NOR AOB"). NOR repeats the same arguments it has asserted all along. They are the same arguments it advanced (i) while opposing the Preliminary Injunction, (ii) during Closing Arguments for the Evidentiary Hearing, (iii) in its Pocket Brief, (iv) during the Additional Hearing, and (v) in its Application for Mandamus. Greenmart of Nevada NLV ("Greenmart") filed its Opening Brief on May 4, 2020 making substantially the same arguments as NOR, with merely minor differences. ("Greenmart AOB").

Rather than focus on the fundamental issue of this matter, which is that the application process for marijuana licenses violated ETW Plaintiffs' constitutionally protected rights, NOR and Greenmart narrowly focused on distracting collateral

issues. The marijuana license application process violated ETW Plaintiffs' constitutional rights because the Department unequally and incorrectly applied and enforced many of the application requirements contained in NRS Chapter 453D and NAC Chapter 453D. The Department unilaterally replaced various statutory license application requirements with its own requirements. Moreover, the Department applied and enforced its unilaterally adopted requirements unequally amongst the license applicants. The Department's deviation from, and unequal application of, the statutory application requirements deprived ETW Plaintiffs of a fair and impartial application process.

NOR and Greenmart now attempt to justify the Department's deviations from the statutory requirements and disregards the effects of the unilaterally adopted and disparately enforced requirements. Indeed, NOR and Greenmart overemphasize that the purpose of the application requirements was to help ensure public health and safety, but disregards the fact that enforcing those requirements, equally, as written were an imperative part of implementing a fair, impartial, and constitutional application process for the applicants.

V. STANDARDS OF REVIEW.

The purpose of a preliminary injunction is to preserve the status quo. *Camco Inc. v. Baker*, 113 Nev. 512, 516, 936 P.2d 829, 831 (1997). A decision to grant or deny a preliminary injunction is reviewed only for an abuse of discretion, but

related questions of law are reviewed de novo. *Labor Comm'r v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). Standing, as a question of law, is reviewed de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Issues of statutory and regulatory interpretation are also reviewed de novo. *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 799, 358 P.3d 234, 240 (2015); *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union/SEIU Local 1107*, AFL-CIO, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008).

The district court's decision to deny equitable relief, such as laches, is within the district court's sound discretion, and will only be disturbed on appeal if there was an abuse of discretion. *See Douglas Disposal, Inc. v. Wee Haul*, LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007) (applying the abuse of discretion standard to the equitable remedy of an injunction).

Abuse of discretion is defined as a clearly erroneous interpretation or application of the law or an arbitrary or capricious exercise of discretion that is "founded on prejudice or preference rather than on reason" or "contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Ct.*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011). When determining if the district court abused its discretion, this court examines whether the decision was supported by substantial evidence and guided by applicable legal principles. *Franklin v. Bartsas*

Realty, Inc., 95 Nev. 559, 562–63, 598 P.2d 1147, 1149 (1979). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Stems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

Reviewing courts do "not substitute [their] judgment for that of the district court," and cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *Young v. Johnny Ribeiro Eldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

Additionally, review on appeal from a preliminary injunction is limited to the record at the time of the district court's ruling. *University and Community College System of Nevada v. Regional Transportation Commission of Washoe County*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

VI. SUMMARY OF THE ARGUMENT.

In an effort to reargue its position below, NOR and Greenmart come before this Court in an attempt to reverse a preliminary injunction that was issued on August 23, 2019, after weeks of extensive hearings before the district court. At bottom, NOR's and Greenmart's argument presents no novel theory of legal interpretation, which the district court missed in a moment of mistake or due to complex legal ambiguities. Nor do NOR and Greenmart present a set of facts that

the district court did not evaluate or misapprehended. Rather, NOR and Greenmart merely repeat the same basic already-rebutted arguments that were promulgated before the district court. NOR's and Greenmart's arguments dwindle down to these four points: (1) the district court supposedly misinterpreted NRS 453D.200(6); (2) this misinterpretation can be corrected if the district court gave the appropriate amount of deference to the Department's interpretation of NRS 453D.200(6); (3) even if the district court had the correct interpretation of NRS 453D.200(6), the plaintiffs should have been prohibited from bringing their claims due to a lack of standing and the equitable defense of laches; and (4) the district court abused its discretion by enjoining NOR and Greenmart.

These arguments are all without merit and should be outright rejected. To start, the district court did not misinterpret NRS 453D.200(6). The plain language of that statute reads "The Department **shall** conduct a background check of **each** prospective owner, officer, and board member of a marijuana establishment license applicant." (emphasis added). The Department promulgated regulations which gave it the authority to only background check owners who held more than a 5% interest in the applying company. *See* NAC 453D.255(1). No amount of backpedaling, contortion of language, or circular argumentation can refute the fact that the Department has directly eschewed a mandatory statutory obligation to background check all owners by passing this regulation. If this Court were to allow

such a deviation from the language of the enabling statute, then it would, in essence, be condoning the modification of a ballot question in violation of Article 19, section 2, clause 3 of the Nevada Constitution. The district court intimately understood the Department's complete disregard for NRS Chapter 453D when it promulgated NAC 453D.255(1).

Next, NOR and Greenmart cannot hide behind deference to the Department because its regulations are undoubtedly beyond the language of the statute. Simply put, NRS 453D.200(6) states that the Department must background check each owner, officer, and board member of the applicant for a recreational marijuana license. The Department, apparently believing that the statutory obligation to background check each owner of the applicant was too onerous, promulgated a regulation that stated that the Department did not need to background check those owners with less than a 5% interest in the company. And now, when the validity of this regulation was challenged, the Department urged the district court to defer to its interpretation. NOR and Greenmart repeat that same argument, urging this Court to trust the Department's interpretation even though it clearly conflicts with the plain language of the statute. But this argument goes against long-established Nevada case law, which states that the Department is entitled to deference only when its interpretation is within the language of the statute. Once again, the

Department's interpretation is outside the language of the statute and is entitled to no deference.

NOR's and Greenmart's argument that ETW Plaintiffs do not have standing to challenge the Department's promulgated regulations is merely a last-ditch attempt to invalidate a properly issued preliminary injunction. Laches and equitable estoppel are also inapplicable, as will be further explained below. And finally, the district court did not abuse its discretion by including NOR in its preliminary injunction.

Finally, as to ETW Plaintiffs' summary of its argument in its cross-appeal. ETW Plaintiffs have cross-appealed the district court's preliminary injunction order based on one paragraph, in which the district court held that the Department could eliminate the physical location requirement. In short, NRS 453D.210(5)(b) requires a physical address to be listed on the application in order for the Department to issue a license. The regulations promulgated by the Department also require a physical address to be listed on the application. *See* NAC 453D.265(1)(b)(3). The district court, relying on an erroneous interpretation of this Court's decision in *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 414 P.3d 305 (2018), decided, contrary to the plain language of the statute and regulation, that the Department could accept applications and issue licenses without requiring a

physical location. The plain language of the statute and the regulations mandates that the Department issue licenses, if, and only if, the applicant lists a proposed physical address on its application. This Court's decision in *Nuleaf* is inapposite and is not nearly as broad as the district court interprets it to be. This case presents an opportunity to clarify *Nuleaf* and give effect to the plain meaning of the statute and regulations.

For these reasons, ETW Plaintiffs respectfully request that this Court deny NOR's and Greenmart's appeal of the Court's preliminary injunction. Moreover, ETW Plaintiffs respectfully request that this Court take this opportunity to clarify *Nuleaf* and to give effect to the plain meaning of NRS 453D.210(5)(b) and NAC 453D.265(1)(b)(3).

VII. FACTUAL BACKGROUND.

A. The Background Check and Physical Location Required by Ballot Question Two.

The ballot initiative to legalize recreational use of marijuana in Nevada, Ballot Question Two ("BQ2"), went to voters in 2016. *See* RA Vol. X, at 1909: 1-2 (Findings of Fact and Conclusions of Law Granting Preliminary Injunction ("FFCL")). As a sensitive community issue, BQ2 expressly addressed various regulatory and public safety concerns and intentionally required strict application procedures. The voters expressly proclaimed in BQ2 their intent that marijuana should be regulated so that retail "business owners are subject to a review by the

State of Nevada to confirm that the business owners and the business location are suitable to produce and sell [it]," and that "cultivating, manufacturing, testing, transporting, and selling [it] will be strictly controlled through state and licensing regulation." NRS 453D.020(3)(b)-(c).

Protecting the people's voice and ensuring the industry's strict regulation, BQ2 firmly ordered that "the Department shall approve or deny applications for licenses pursuant to NRS 453D.210." NRS 453D.200(2). BQ2 also explicitly required the State to, among other things, "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant" (the "Background Check"). NRS 453D.200(6); RA Vol. X, at 1911: 4-6.

Similarly, each applicant was required to provide the physical location for the proposed retail marijuana establishment as follows (the "Physical Location"):

> …the Department shall approve a license application if the physical address where the proposed marijuana establishment will operate is owned by the applicant or the applicant has the written permission of the property owner to operate the proposed marijuana establishment on that property. NRS 453D.210(5)(b).

In addition, the Physical Location could not be located: (i) within one thousand feet of a public or private school (NRS 453D.210(5)(c)(1)); (ii) within three hundred feet of an existing community facility (NRS 453D.210(5)(c)(2)); or (iii) within 1,500 feet of an establishment that holds certain nonrestricted gaming licenses if the county of the proposed Physical Location has a population of more

than 100,000 people (NRS 453D.210(5)(c)(3)).

Accordingly, the Department adopted a corresponding regulation ordering that "the application must include, without limitation . . . the physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishments. NAC 453D.265(1)(b)(3), 453D.268(2)(e).

Permitting limited flexibility, BQ2 narrowly permitted the adoption of regulations necessary or convenient to carry out the provisions of NRS Chapter 453D, but prohibited such regulations from making the operation of marijuana establishments unreasonably impracticable. Specifically BQ2 stated:

> . . .the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter. The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable. NRS 453D.200(1).

The term "unreasonably impracticable" means "that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson." NRS 453D.030(19).

The Department released the application for recreational marijuana establishment licenses, including the Physical Location requirement, on July 6,

2018. *See* RA Vol. X, at 1915: 24-25.

B. The Department's Deviation from the Background Check and Physical Location Requirements.

On November 8, 2016, Governor Brian Sandoval, established a 19-member task force (the "Task Force") to develop proposed regulations and practices to facilitate the application process. *See* RA Vol. X, at 1911: 7-9. The Task Force issued recommendations on May 30, 2017, which largely followed the process used years earlier for issuing licenses for medical marijuana that was not subject to the voter mandated constraints in BQ2. *Id.* at 1911: 10-15; RA Vol. I, at 0024; AA 46, at 011430. As a result, some of the Task Force's recommendations did not follow BQ2's requirements. *See* RA Vol. X, at 1911:16. Namely, the Task Force's recommendation relaxing the requirements for the Background Check is contrary to the plain language of BQ2. *Id.* at 1911:18-28, n. 7.

Based on the Task Force's recommendation, the Department adopted a drastically different background check requirement that called for a background check only on applicants with an aggregate ownership interest of 5% or more in a marijuana establishment applying for a license and disregarded BQ2's express mandate that applied to "each prospective owner, officer, and board member of a marijuana establishment license applicant." NAC 453D.255(1); NRS 453D.200(6); RA Vol. X, at 1911:18-28, n. 7, 1918:24-1919:2. In addition to unilaterally amending NRS 453D.200(6), the Department ultimately made no effort to verify

that all persons with an aggregate ownership interest of 5% or more in a marijuana establishment were actually disclosed. *See* RA Vol. X, at 1918:24-1919:8.

Furthermore, the Department released a revised application, receive only by some applicants, that eliminated the Physical Location requirement as expressly required by NRS 453D.210(5)(b) and NAC 453D.265(1)(b)(3), NAC 453D.268, and NAC 453D.268(2)(e).[3] *Id.* at 1916:12-19.

C. NOR Failed to Comply with NRS 453D.200(6).

NOR submitted an organizational chart and ownership structure exhibit with its application that demonstrated a mere shell company has full direction and control over it and that shell company is 100% owned by a publicly traded corporation. *See* RA Vol. I, at 0165; AA 47, at 011577. Indeed, GGB Nevada, LLC ("GGB Nevada"), which owns 95% of NOR, is wholly owned and controlled by Xanthic Biopharma Inc. ("Xanthic"), a publicly traded company. GGB Nevada's supermajority ownership of NOR combined with Xanthic's complete ownership and control of GGB Nevada transforms Xanthic's shareholders into majority owners of NOR in a pass-through nature ("NOR's Pass-Through Ownership Structure"). Importantly, NOR did not disclose information for Background Checks to be performed on each prospective owner or shareholder of Xanthic as required by NRS 453D.200(6). Instead, NOR disclosed only board members and

[3] The newly released application was received by only certain applicants. *See* RA Vol. X, at 1916:12-22.

officers. *Id.*

In addition, NOR submitted incomplete applications because it provided the address to a UPS Store as its physical location, which violated NRS 453D.210. *See infra* RA Vol. VIII, at 1530:24-1531:21, 1532:12-23; Vol. VII, at 1345, 1348-49.

D. The Preliminary Injunction.

1. The Evidentiary Hearings.

This action commenced on January 4, 2019, and the number of plaintiffs and defendants subsequently grew through intervention, consolidation, and amended pleadings. *See* RA Vol. I, at 0179. Thereafter, the plaintiffs sought a preliminary injunction against the Department (the "Preliminary Injunction"). In addition to the briefs addressing the Preliminary Injunction, the district court conducted a 20-day evidentiary hearing to decide the matter that spanned from May 28, 2019 to August 16, 2019 (the "Evidentiary Hearing"). The district court heard a great deal of testimony and received various exhibits during that time.

Notably, the district court received exhibits and heard testimony that NOR's applications listed a UPS Store address as its physical location. Specifically, Mr. Andrew Jolley of NOR testified that the physical locations listed in NOR's applications were "identical to the property locations of applicants Essence and Thrive." *See* RA Vol. VI, at 1073:3-1074:2; Vol. VIII, at 1426:20-25. Mr. Jolley

also identified the address of the location as 5130 South Fort Apache Road, and answered that he could not recall if he had ever been to the location. *See* Vol. VIII, at 1429:14-82:2.

Subsequent testimony of Mr. Steve Gilbert, Health Program Manager III with the Department (*See* Vol. V, at 0994:10-0995:9, 1003:16-1005:15), confirmed the UPS Store address as follows:

> Court: So we're going to use the demonstrative exhibit that's been identified and it's now going to bear the next demonstrative in order.
>
> Clerk: D-7.
>
> Q: So just for the purposes of the room, this is a – the result of a Google Maps search performed today, June 11, 2019, which it says at the top left corner. And then if you go below to the bottom, this is a street view and it says – you can see the information pulled up through Google Maps, and it says 5130 South Fort Apache Road. Do you see that?
>
> A: I do, yes.
>
> Q: Is that the same address that's contained in the applications for both Thrive and Essence?
>
> A: Yeah. The 5130 South Apache Road is the same.
>
> Q: Now D-8 is again pulled up this morning, today, June 11, 2019, and it shows the address of the UPS Store as 5130 South Apache Road, Suite 215. Would you agree with me that both applications use the same starting number for the suite, 215?
>
> A: Yes.
>
> Q: I don't think UPS Store would allow it. But even if

> they would, seeing what we've seen from the street view, wouldn't it be difficult to place those two locations in that UPS Store?
>
> A: It would be difficult.
>
> Q: Impossible even?
>
> A: Yeah. It would be impossible.

See Vol. VIII, RA 1531:2-18, 1532:18-23, 1533:6-12; *see also* Vol. VII, at 1345, 1348-49.

The Evidentiary Hearing's closing arguments began on Thursday, August 15, 2019, and concluded on Friday, August 16, 2019 (the "Closing Arguments").

During NOR's Closing Argument, it conceded that although it would be extremely difficult, identifying every prospective owner, officer, and board member for a publicly traded company was not an impossible task. *See* RA Vol. X, at 1777:3-12. Although NOR initially took the position that it was impossible, it recanted when the district court stated: "and you know it's not impossible, because when we have proxy battles we make sure in regular Business Court cases that we have a record date on which identified shareholders are made of record, and then the proxy statements go to those. It's not an impossible situation, Mr. Koch." *Id.*

On the whole, NOR failed to articulate how the Background Check required such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson. Instead, NOR primarily argued

that the Background Check acted as an implicit prohibition on public companies from operating retail marijuana locations. RA Vol. X, at 1778:1-9.

After Closing Arguments concluded, the district court requested that the Department review the documents and information in its possession and identify applicants that were awarded conditional licenses but failed to identify each prospective owner, officer, and board member for the Background Checks pursuant to NRS 453D.200(6) (the "Noncompliant Applicants"). RA Vol. X, at 1898:2-1899:13. Recognizing the Department's authority in the application process and that the Department alone had access to all of the applications necessary to determine who the Noncompliant Applicants were, the district court specified: "you are the only one in a position to be able to provide this information." *Id.*at 1898:2-4.

2. The Pocket Briefs.

In the days leading to Closing Arguments, the district court announced that it would permit the parties to submit pocket briefs to clarify issues heard during the Evidentiary Hearing. *See* RA Vol. IX, at 1690:13-25. NOR submitted its pocket brief on August 14, 2019 ("NOR's Pocket Brief"). *Id.* Vol. IX, at 1695. NOR's Pocket Brief primarily focused on the Department's amendment of the Background Check in its adoption of NAC 453.255(1). NOR asserted that deference must be given to the Department's interpretation of the requirements set forth in NRS

Chapter 453D, and that the Background Check requirement, as approved by the people, was absurd and unreasonable.

Even though it spanned more than fifteen pages, NOR's Pocket Brief lacked specific examples to support its positions. Rather than present legal analysis and apply law to fact, NOR urged subjective presumptions and used broad, sweeping, and conclusory language to support its contentions.

For example, NOR decreed:

> In this case, a literal interpretation of NRS 453D.200(6) as applied publicly traded companies would be absurd to anyone. *Id.* Vol. IX, at 1701:15-16.
>
> NRS 453D.200(6) would require the Department to conduct a background check on everybody. Such a result is so absurd that nobody would bat an eye on limiting the definition of prospective to avoid that result. *Id.* at 1701:22-24. . . . it is literally impossible to conduct a background check on each actual owner of a publicly traded company. Id. at 1702:1-2.
>
> Nobody would assume the voters intended the mandate to conduct a background check on each owner would require the Department to conduct a background check each time a stock traded hands as such a result would be absurd and impossible. *Id.* at 1702:4-7.

NOR also suggested that the Background Check of Xanthic's shareholders could have and should have been conducted with the final steps of licensure. *Id.* at 1706:18-1708:19.

The Department and the defendant group consisting of Integral Associates, LLC, d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, and Essence

Henderson, LLC (collectively, "Essence") also submitted pocket briefs. *See* RA Vol. IX, at 1724. The Department contended that BQ2's narrow language allowing it to adopt regulations "necessary or convenient" to carry out the provisions of the statutes granted it broad authority to amend or modify NRS Chapter 453D as it deemed appropriate. *See* RA Vol. VII, at 1286:3-1288:9.

Essence asserted similar arguments, but added that the Department's decision should be given deference as discussed in *Nuleaf*, which concerned statutes for medical marijuana. *See* RA Vol. IX, at 1730:1731-8:28. Importantly, the statute at issue in *Nuleaf* was determined to be ambiguous, and the *Nuleaf* Court qualified its holding by stating that deference is due "when the interpretation does not conflict with the plain language of the statute or legislative intent." *Id.* at 1731:3-8 (citing *Nuleaf*, at 310-11).

Greenmart also cited *Nuleaf* and claimed the Department should be given deference. *Id.* at 1718:6-1721:13). Greenmart also questioned the Plaintiffs' standing to bring the underlying lawsuit and claimed the doctrines of laches and estoppel barred the Plaintiffs from challenging the application process and regulations promulgated by the Department. *Id.* at 1715:23-1718:5.

3. The Department's Determination of Noncompliance.

Pursuant to its assignment to identify the Noncompliant Applicants, on August 21, 2019, the Department identified four applicants that were awarded

conditional licenses, and that it could not confirm whether they identified each prospective owner, officer, and board member as required by NRS 453D.200(6). The Noncompliant Applicants were: (i) Helping Hands Wellness Center, Inc.; (ii) Lone Mountain Partners, LLC; (iii) Nevada Organic Remedies, LLC; and (iv) Greenmart of Nevada, LLC. *Id.* Vol. X, at 1903-04.

In making the determination, the Department emphasized its neutrality regarding which applicants failed to comply, stating it sought to:

> [A]nswer the Court's question in a neutral fashion based on the information available to it from the applications themselves, testimony given at the hearing (without reference to issues of admissibility, which an affected party may raise), and information publicly available from a government website (the Canadian Securities Exchange website), which was submitted by the applicant or information submitted about the applicant by an entity claiming an affiliation to the applicant. *Id.* at 1904.

The district court accepted the Department's assessment and deferred to its judgment as to the correctness of the disclosures in the applications. Ultimately, the Department was enjoined from moving forward in the licensing process with applicants that did not provide sufficient information to allow for compliance with the Background Check requirement, which consisted of the Noncompliant Applicants identified by the Department.

4. The FFCL.

The district court granted the Preliminary Injunction and issued its findings of fact and conclusions of law supporting its decision on August 23, 2019. *See* RA

Vol. X, at 1905.

In the FFCL's preliminary statement, the district court expressly stated that it "gives deference to [the Department] in establishing those regulations and creating the framework required to implement those provisions in conformity with the initiative." *Id.* at 1908:17-18. The district court also recognized its duty to:

> . . . balance the mandatory provisions of BQ2 (which the DOT did not have discretion to modify); those provisions with which the DOT was granted some discretion in implementation; and the inherent discretion of an administrative agency to implement regulations to carry out its statutory duties. The Court must give great deference to those activities that fall within the discretionary functions of the agency. Deference is not given where the actions of the DOT were in violation of BQ2 or were arbitrary and capricious. *Id.* at 1909:2-8.

Referring to the Department's departure from BQ2's Background Check requirement, the Court found that:

> The DOT's determination that only owners of 5% or greater interest in the business were required to submit information on the application was not a permissible regulatory modification of BQ2. This determination violated Article 19, Section 3 of the Nevada Constitution. The determination was not based on a rational basis.
>
> The prohibition of making operation of marijuana establishments unreasonably impracticable applied to the regulations adopted by the DOT, not the provisions of NRS Chapter 453D.
>
> The adoption of NAC 453D.255(1), as it applies to the application process is an unconstitutional modification of BQ2. The failure of the DOT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process. The DOT's decision to adopt regulations in direct violation of BQ2's mandatory application requirements is violative of Article 19, Section 2(3) of the Nevada Constitution."

See RA Vol. X, at 1919:9-22.

The district court further explained the Department's violation of the Nevada Constitution, stating:

> Given the lack of a robust investigative process for applicants, the requirement of the background check for each prospective owner, officer, and board member as part of the application process impedes an important public safety goal in BQ2.
>
> Without any consideration as to the voters mandate in BQ2, the DOT determined that requiring each prospective owner be subject to a background check was too difficult for implementation by industry. The decision was a violation of the Nevada Constitution, an abuse of discretion, and arbitrary and capricious.
>
> The DOT did not comply with BQ2 by requiring applicants to provide information for each prospective owner, officer, and board member or verify the ownership of applicants applying for retail recreational marijuana licenses. Instead the DOT issued conditional licenses to applicants who did not identify each prospective owner, officer, and board member. Notwithstanding the DOT's failure to comply with BQ2's Background Check requirements, the DOT subsequently asserted that some applicants did disclose the required information for each prospective owner, officer, and board member.[4]

Id. at 1920:1-12, n.15.

Citing well established law, the district court emphasized Nevada's policy of protecting voter initiatives. The district court recited that "the Nevada Supreme

[4] The Department asserted that Green Therapeutics, LLC, Eureka NewGen Farms, LLC, Circle S Farms, LLC, Deep Roots Medical, LLC, Pure Tonic Concentrates, LLC, Wellness Connection of Nevada, LLC, Polaris Wellness Center, LLC, TRNVP098, LLC, Clear River LLC, Cheyenne Medical LLC, Essence Tropicana LLC, Essence Henderson LLC, and Commerce Park Medical LLC all submitted the required information. *Id.* at 1920 n.15.

Court has recognized that initiative petitions must be kept substantively intact [*sic*] otherwise, the people's voice would be obstructed . . . initiative legislation is not subject to judicial tampering-the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034, 1039—40 (2001); RA Vol. X, at 1923:7-13.

Stressing Nevada's policy, the district court underscored the Department's breach of authority:

> The DOT was not delegated the power to legislate amendments because this is initiative legislation. The Legislature itself has no such authority with regard to NRS 453D until three years after its enactment under the prohibition of Article 19, Section 2 of the Constitution of the State of Nevada.
>
> The DOT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5% prior to award of a conditional license is an impermissible deviation from the mandatory language of BQ2, which mandated "a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant."
>
> The argument that the requirement for each owner to comply with the application process and background investigation is 'unreasonably impracticable' is misplaced. The limitation of unreasonably impracticable applied only to the Regulations not to the language and compliance with BQ2 itself.
>
> The DOT acted beyond its scope of authority when it arbitrarily and

> capriciously replaced the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5% or greater standard in NAC 453.255(1). This decision by the DOT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution.
>
> As Plaintiffs have shown that the DOT clearly violated NRS Chapter 453D, the claims for declaratory relief, petition for writ of prohibition, and any other related claims is likely to succeed on the merits. The balance of equities weighs in favor of Plaintiffs. The DOT stands to suffer no appreciable losses and will suffer only minimal harm as a result of an injunction.

Id. at 1923:1420, 1926:4-14, 1926:18-28, 1927:5-7; NRS 453D.200(6).

Concluding its analysis and granting the preliminary injunction, the district court declared that "the State is enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6) pending a trial on the merits." *See* RA Vol. X, at 1928:4-7.

Although it did not rely upon the issue to support granting the Preliminary Injunction, the district court found that "the DOT's late decision to delete the physical address requirement on some application forms while not modifying those portions of the application that were dependent on a physical location (i.e. floor plan, community impact, security plan, and the sink locations) after the repeated communications by an applicant's agent; not effectively communicating the revision; and, leaving the original version of the application on the website, is

evidence of conduct that is a serious issue." *Id.* at 1920:13-18. The district court further held that "based upon the evidence adduced . . . the DOT selectively discussed with applicants or their agents the modification of the application related to physical address information. *Id.* at 1924:10-13.

The district court also determined that the Department's change to the Physical Location requirement "limited the ability of the Temporary Employees to adequately assess graded criteria such as: (i) prohibited proximity to schools and certain other public facilities; (ii) impact on the community; (iii) security; (iv) building plans; and (v) other material considerations prescribed by the Regulations." *Id.* at 1925:7-12.

Although the district court found fault and error with the Department's unilateral change to the Physical Location requirement, it erroneously determined that those actions by the Department did not violate the Nevada Constitution and could "be cured prior to the award of a final license." The district court did not provide a basis for its determination. *Id.* at 1925:3-7 (stating "[t]he DOT has only awarded conditional licenses which are subject to local government approval related zoning and planning and may approve a location change of an existing license, the public safety aspects of the failure to require an actual physical address can be cured prior to the award of a final license").

Before the Preliminary Injunction went into effect, the district court

permitted additional argument on the issues (the "Additional Hearing").

5. The Additional Hearing.

During the Additional Hearing on August 29, 2019, NOR acknowledged that its objection was directed only at the Department, signaling that the Preliminary Injunction itself was not the source of its purported grievance. Specifically, NOR stated:

> I really think my audience today is frankly Mr. Shevorski and the Department, because the Court asked the Department to make a determination of the applications and the information contained there and to report back to the Court on what it found. And the Court is not making a determination of what was there, so they're asking the Department for that information. *See* RA Vol. XI, at 1957:5-11.

NOR also professed that it was not asking the district court to reconsider, but to convince the Department that it did comply with NRS 453D.200(6). NOR declared:

> The Court considered a lot of information and put that into the order. We would disagree with the component of that order with respect to the 5 percent provision and the 453D.255 of the regulations. We're not here to argue that, we're not asking the Court to reconsider that. What we're here for today is to confirm that in fact my client did comply with the requirement to list all prospective owners, officers, and board members so that it can move forward with its perfection of its application. *Id.* at 1957:13-23.

> But I think Mr. Shevorski [sic] probably rightly, although I may disagree, I suppose, said, look, we're neutral, the Court has asked us to do something, we're going to do what the Court asked us to do and make a decision on what the Court asked us to do and submit that, but we're not deciding anything else, we're not saying yea or nay, we have a question that cannot be answered. *Id.* at 1959:7-13.

> And so when the State said, we have an open question of whether there were shareholders who owned a membership interest in the applicant, information was there all along. Because what that ownership interest is in an applicant, in an LLC, an ownership interest is a membership interest. And that information was provided. The Nevada Organic Remedies itself is not a public company, it's an LLC. None of the owners of the membership interests of Nevada Organic Remedies are public companies. Each of the owners of those membership interests in Nevada Organic Remedies was disclosed, was approved by the Department, and for that reason Nevada Organic Remedies must be included – to the extent that the Court is even going to consider that point, included within the group of those applicants that have properly disclosed all prospective owners, officers, and board members. *See* RA Vol. XI, at 1960:10-24.

Ignoring its Pass-Through Ownership Structure and Disclosure during the application process, NOR refused to accept the Department's determination. NOR continued:

> But we believe background checks were in fact completed of those that were listed there. If the Department believed that there needed to be a background check done of the entity that owned membership interests in Nevada Organic Remedies, it fashioned such relief. They've not been asked to do that. *Id.* at 1961:4-9.

> So we believe that Nevada Organic Remedies has clearly complied with the statute, the express terms of the statute as the Court has read that statute literally, and we have complied with what the Department has requested, and the Department has approved what we have submitted. And we do not believe we need to go any further than that, but to the extent that the Department would come back now and say, oh, we approved it before but now we have a question, we believe that the Department would be estopped from taking that position, because we complied with the rules and regulations in place at the time that the Department asked to provide without objection but actually explicit approval of that list that was provided to the Department. *Id.* at 1961:10-22.

Omitting all references to the shareholders of Xanthic, NOR pressed:

> We provided a list of each prospective owner, officer, and board members. Listed right there. The change of ownership letter is there, but it's also directly in the application. We provided that as part of our Exhibit B, here are the owners, these are the owners of the applicant, and it is disclosed right there. There is no secondary question. The Court has read that statute quite literally . . . And, frankly, that's what, you know, plaintiffs, many of them, same type of situation. Frankly, some of them probably a little more explicit . . . Serenity, same thing. Said, here's our structure, here's the LLC that owns a membership in our entity. We're not saying anybody did anything wrong in that. That's what was asked for, that's what was provided. *Id.* at 1962:4-25.

> But for that purpose, for purposes of what we had explained and clearly laid out, there is no public ownership of a membership interest in our applicant. We've complied with the statute, we've complied with the law, and for that purpose, to the extent the Court is going to make any determination, which I think that's up to the State to do or the Department to do, it should include Nevada Organic Remedies in the list of companies that provided full ownership and can move forward with perfecting their conditional licenses in a timely manner. *Id.* at 1963:15-24.

During the Additional Hearing, ETW Plaintiffs jointly, with other plaintiffs, asserted that the Department violated the Nevada Constitution when it unilaterally modified the Physical Location requirement in NRS 453D.210(5)(b), because the statute clearly and unambiguously requires all applicants to provide a physical address for the proposed marijuana establishment. *See* RA Vol. XI, at 1937:1-8, 1940:1-12. ETW Plaintiffs added that the statute's plain language requires the Physical Location requirement be satisfied in order for the application process to develop into the impartial and numerically scored bidding process when competing

applications are submitted for a proposed marijuana store within a single county. *Id.* at 1940:1-12; NRS 453D.210(6).

In opposition, the Department permitted Essence to argue on its behalf. AA 011344:20-011345:1. Essence reiterated the deference discussed in *Nuleaf*, and argued that interpreting the statute's plain language according to its ordinary meaning did not make sense, and that *Nuleaf* controlled the statutory scheme for medical marijuana licensing and the separate statutory scheme for recreational marijuana licensing. *Id.* at 1943:7-1945:2.

Essence also alleged that the Department properly changed the Physical Location requirement because it was not possible to require a physical address for the proposed location due to implementation issues such as local jurisdictional land use regulations. *Id.* at 1942:14-1946:13. Attempting to overcome the fact that *Nuleaf* addressed an entirely different statutory scheme with material differences from NRS Chapter 453D, an entirely different licensing process, and did not involve an express ballot initiative, the defendants reassured: ". . . *Nuleaf* does apply here . . . the language is not identical, but substantively it is the same." *Id.* at 1941:16-18.

Ultimately, the district court determined the application process was adversely impacted by the Department's amendment to the Physical Location requirement, but excused the Department's actions under the *Nuleaf* decision. *See*

RA Vol. XI, at 1954:13-18.

6. The District Court's Order.

Also during the Additional Hearing, the district court discussed its effort to narrow the Preliminary Injunction to the greatest extent within its means. The district court clarified the Department's contribution to narrowly tailoring the scope of the Preliminary Injunction. The district court stated:

> Because the Court did not have unredacted versions of the application for all applicants, it was impossible and remains impossible for the Court to make a determination, which is why I have asked the Department of Taxation to make the determination, since that's within their records." *Id.* at 1983:19-23.

Then the district court identified the parties that were subject to the Preliminary Injunction based upon the Department's determination of the Noncompliant Applicants. The district court also explained that any disagreement with the determination should be addressed with the Department, as the court deferred to its assessment of the information in its possession and control. The district court specified that modifications to the Department's determination of the Noncompliant Applicants remained within the Department's authority. The district court declared:

> While I certainly understand the arguments by the parties that certain other information was available that may not be within the scope of my question, my question was limited for a reason. Those who are in the third category [the Noncompliant Applicants] will be subject to the injunctive relief which is described on page 24 the findings of fact and conclusions of law. Those who are in the first and second

category will be excluded from that relief." *Id.* at 1984:14-21.

> Any request for modifications by the State based upon the State's review of the applications that were submitted by the applicants during the application period will be submitted by motion by the State, and then all of you will have an opportunity to submit any briefs and any argument you think is appropriate. I am not precluding the State from making any other determinations related to this very flawed process the State decides to make related to the application process. That's within the State's determination as to how they handle any corrections to this process. And I'm not going to determine what that is. I was merely seeking to exclude applicants who filed applications in compliance with NRS 453D.200(6) at the time the applications were filed from the injunctive relief that I have granted in order that was filed last Friday on page 24.
>
> Does anybody have any questions about the tiers? Any issues should be directed to the Department for you to resolve based on the information that was in your application at the time. *Id.* at 1984:22-1985:16.

VIII. LEGAL ARGUMENT.

A. ETW Plaintiffs Met Their Burden to Show a Probability of Success on the Merits Because NRS 453D.200(6) Mandates That the Department Background Check Each Owner of the Applying Entity Prior to Issuing a Recreational Marijuana License.

NOR's and Greenmart's arguments seem to mix up and turn around numerous well-established principles of statutory interpretation. Attempting to distort the plain meaning of NRS 453D.200(6), NOR asks this Court to inappropriately look past the unambiguous and plain language to push its perceived intent of the drafters. NOR AOB at 32–37. Additionally, NOR fails to explain why the plain language differs in any way from the drafter's intent, aside from

comparing it to other regulations under dissimilar statutes. NOR AOB 33–36.

Notwithstanding its assortment of "legislative intent" arguments, NOR merely states that a plain reading of the statute would be "absurd" in result. NOR AOB 28–32. Similarly, Greenmart forgoes the plain language analysis, makes no assertion that the statute is ambiguous, and jumps straight to the Department's interpretation of NRS 453D.200(6) and the absurdity doctrine. Greenmart AOB 33–44. But again, the plain language of the statute demands that the Department background check each of the owners of the applicants. *See* NRS 453D.200(6). Despite NOR's and Greenmart's bemoaning the purported absurdity of the statute, this Court openly holds that it will interpret the language of a statute and refrain from substituting its own judgment for what may considered absurd. *See Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 244 (1967) (explaining, in great depth, that the legislative power rests with the people and the legislature and not with the courts).

1. The Plain Language of NRS 453D.200(6).

When interpreting a statute, courts look first to its plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). In doing so, courts must consider all of the statutory provisions as a whole, and read them in such a way that "would not render words or phrases superfluous or make a provision nugatory." *S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446,

449, 117 P.3d 171, 173 (2005). A proper reading of a statute should not lead to an "unreasonable or absurd result" and should, as a general matter, "give effect to the Legislature's [or in this instance, voters,] intent." *Id.* Moreover, courts should interpret provisions within a common statutory scheme "harmoniously with one another in accordance with the general purpose of those statute[s]." *Id.* (*citing Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001), *as amended* (Nov. 14, 2001)); *see also State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830, 836 (1977) ("Our obligation is to construe the mentioned statutory provisions in such manner as to render them compatible with each other.").

When a statute is clear on its face, courts give the statute's plain language its ordinary meaning. *Waste Mgmt. of Nevada, Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 170, 443 P.3d 1115, 1117 (2019). For undefined statutory terms, this ordinary meaning may be discerned from dictionary definitions. *See id.* at 171, 443 P.3d at 1118 (applying dictionary definitions to common terms); *see also Advanced Pre-Settlement Funding LLC v. Gazda & Tadayon*, Case No. 74802, 437 P.3d 1050 (Nev. 2019) (unpublished) (*citing Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566-67 (2012)). When a statute is not clear on its face, "meaning that it is susceptible to multiple natural or honest interpretations," courts may look beyond the statute to determine its meaning. *Waste Mgmt. of Nevada, Inc.*, 135 Nev. at 170, 443 P.3d at 1117. Courts follow these same rules of statutory construction

when interpreting administrative regulations. *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union/SEIU Local 1107, AFL-CIO*, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008) ("Regulations are subject to these same rules of interpretation.").

Beginning with the text of NRS 453D.200(6), the statute states, in relevant part, that "[t]he Department shall conduct a background check of **each** prospective owner, officer, and board member of a marijuana establishment license applicant." (emphasis added). This language is clear, unequivocal, and unambiguous. The word "shall" "imposes a duty to act" when used in the Nevada Revised Statutes. NRS 0.025(d). The word "shall" means "imperative or mandatory [and is] inconsistent with a concept of discretion." *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (citing *Shall*, Black's Law Dictionary (6th ed. 1990)). Further, the definition of the word "owner" is also clear and unambiguous: owner is defined as "a person in whom one or more interests are vested." *Owner*, Black's Law Dictionary (11th ed. 2019). Additionally, the word "each" further indicates that the Department must background check every person who has an ownership interest in the applicant.

Thus, the Department had an affirmative obligation based on this statute to conduct a background check on ***each*** prospective owner, officer, and board member. Despite this express obligation, the Department found this background

check requirement to be too onerous and did not implement appropriate corresponding regulations. Instead, the Department promulgated a regulation that stated, in relevant part, that "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." NAC 453D.255(1). The Department then unilaterally gave itself the **discretion** to conduct a background check for any owner with less than a 5% ownership interest. *Id.*

This regulation directly contradicts NRS 453D.200(6), which affirmatively requires each owner to undergo a background check to be awarded an application. The Department, therefore, acted beyond the scope of its authority by enacting this regulation, as it violates the statute. As such, the competitive bidding process was sullied by this invalidly adopted background check regulation. *See Meridian Gold Co. v. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003) (holding that a regulation is invalid when it contradicts the enabling statute).

NOR and Greenmart completely fail to address the plain language issue, and instead dubiously jump straight to the legislative intent of the statute. But again, it is well established that "[i]f the plain meaning of a statute is clear on its face, then [this court] **will not go beyond the language of the statute to determine its meaning**." *Waste Mgmt. of Nevada, Inc.*, 135 Nev. at 170, 443 P.3d at 1117 (*citing*

Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Ct., 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004)) (emphasis added).

Thus, it is clear black-letter law that "[w]hen a statute's language is plain and its meaning clear, the courts will apply that plain language;" and therefore "[o]nly when a statute is ambiguous will this court resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 131, 393 P.3d 673, 679 (2017) (internal quotation marks omitted).

Even though NOR cites to cases from the United States Supreme Court to rebut this proposition, those cases are over 40 years old and are taken out of context. This is exemplified by the fact that this Court has re-affirmed this principle several times. *See, e.g.*, *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017) ("When interpreting a statute, if the statutory language is 'facially clear,' this court must give that language its plain meaning."); *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 130 Nev. 334, 338–39, 325 P.3d 1259, 1262 (2014) ("Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language."); *In re George J.*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012) ("[i]f the statute's language is clear and unambiguous, [this court will] enforce the statute as written.").

Further, the United States Supreme Court more recently explained that "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Such circumstances present themselves only when the "application of the statute as written will produce a result **demonstrably at odds** with the intentions of its drafters." *Id.* (internal quotation marks omitted) (emphasis added). This generally occurs when there is an "obvious mistake," such as a scrivener's error. *Clinton v. City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part). As explained below, NOR demonstrates no such obvious error.

This same argument applies to Greenmart's argument that "if 'a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so violates the spirit of the act." Greenmart AOB 43 (*quoting Griffith v.Gonzalez*, 132 Nev. 392, 394, 373 P.3d 86, 87-88 (2016)). Again, this is more an appeal to the absurdity doctrine, given that "[w]hen interpreting a statute, if the statutory language is 'facially clear,' this **court must give that language its plain meaning.**" *City of Sparks*, 133 Nev. at 402, 399 P.3d at 356. Aside from generalities regarding Greenmart's belief that it should be made easier for background checks of owners of applicants that are publicly-traded companies, and generalized cites to NRS Chapter 453D's statement of purpose for recreational marijuana to be treated similar to other legal businesses, there is no indication that

any drafting mistake was made contrary to the public purpose of the statute generally.

Thus, given that the language of this statute is clear and unambiguous, and given that NOR and Greenmart makes no compelling case that there is ambiguity in the plain language of the statute thereby allowing this Court to ignore the use of the word "each" and "owner" in NRS 453D.200(6), this Court should uphold the statute's plain language. The Department is statutorily obligated to background check **each and every** owner of the prospective recreational marijuana license holder, no matter the chosen corporate structure of that applicant. As such, this Court should uphold the district court's ruling on the plain language of the enabling statute alone. Moreover, if this Court were to allow the Department to unilaterally go beyond this plain language it would violate Article 19, section 2, clause 3 of the Nevada Constitution because it would effectively amend NRS 453D.200(6) during the constitutionally prohibited three year period.

2. The absurdity doctrine does not apply where the plain language of the statute does not result in an absurd result.

Even unambiguous statutes should be read in such a way to avoid absurd results. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). Generally, such absurd results are derived from a scrivener's error or other drafting mistakes that show that the clear intent of the legislature was subserved in the codification of the statute in question. *See Pritchett v. Office*

Depot, Inc., 420 F.3d 1090, 1093 n.2 (10th Cir. 2005) (*citing United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)) (explaining that the absurd results doctrine applied due to a perceived typographical error). In short, this Court should not substitute its judgment for what is absurd, and instead should invoke the absurdity doctrine if, and only if, "the claimed absurdity [1] consist[s] of a disposition that no reasonable person could intend and [2] that it be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously **a technical or ministerial error**." Laura R. Dover, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 Nev. L. J. 741, 753 (2019) (*citing* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237-38 (2012)) (emphasis added) (internal quotation marks omitted).

"Where the language of the statute is plain and unambiguous . . . , a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." *City of Reno v. Yturbide*, 135 Nev. 113, 115–16, 440 P.3d 32, 35 (2019). Thus, this Court should not invoke the absurdity doctrine to implement certain policy goals, but instead should invoke it only to fix a ministerial drafting error; otherwise, courts would be exercising functions that are exclusively reserved to the power of the legislature.

At this point in its argument, NOR alleges, in a conclusory manner, that the statute is ambiguous because "owner" is not defined in the statute. NOR AOB 25, 29-32. Notably, NOR does not explain why it does not attempt to simply define the term using ordinary definitions, as generally done by courts, and makes no effort to explain the constraints upon this Court in invoking the absurdity doctrine. *See, e.g.*, *Waste Management*, at 171, 443 P.3d at 1118 (applying dictionary definitions to common terms when no statutory definitions were in place). Instead, NOR merely string cites to several cases, all of which state that the absurdity doctrine exists. NOR AOB at 28 n.10. Additionally, Greenmart appeals to the absurdity doctrine, largely repeating NOR's argument, but makes no effort to claim that NRS 453D.200(6) is ambiguous. Again, without an ambiguity in the statute, this Court is required to effectuate the statute's plain language. *See Yturbide*, 135 Nev. at 115-16, 440 P.3d at 35.

Rather than employ the proper analysis, NOR and Greenmart proclaim that the statute results in absurdity because (1) it would be difficult to conduct background checks on shareholders of publicly traded companies; and (2) as a result, it could make it impossible to license publicly traded companies but that result cannot be what the legislature intended. But this interpretation is not patently absurd. Surely, the drafters of (or voters for) NRS 453D.200(6) could have intended to favor non-publicly traded Nevada companies to get licenses over huge

multi-national publicly traded companies. Given the fact that this initial competitive bidding process was open only to previously-licensed medical marijuana entities, supports the position that the drafters were not anticipating a large influx on multi-national publicly-traded companies into the application process. Moreover, the drafters could have also assumed that publicly traded companies could not deal in marijuana given the current federal ban on marijuana products. Indeed, it is not absurd to hypothesize that voters in this did not anticipate that large publicly-traded marijuana companies would not be competing in this market.[5] Indeed as Greenmart explains, the entities who were allowed to apply for recreational marijuana licenses during this cycle were only those who already had medical marijuana licenses, and therefore the drafters may have envisioned that only Nevada companies would be competing in this space. *See* Greenmart AOB 28-29 (*citing* 41 AA 10171). Additionally, it should not shock the conscience of this Court, that the drafters would want the Department to be especially vigilant about who is investing in the marijuana market to ensure that no organized crime plagued this blossoming industry. NRS Chapter 453D specifically states that its purpose is to create a system in which the "sale of marijuana should

[5]For example, Colorado did not allow publicly traded companies to participate in its marijuana market until 2019, years after it legalized recreational marijuana. *See* Justin Wingerter, *Colorado's Marijuana Industry Opens to Outside Investors*, THE DENVER POST (2019).

be taken from the domain of criminals and be regulated under a controlled system." NRS 453D.020(2). And the statute has mechanisms, including background checks, to ensure that criminals do not have a foothold in Nevada's legalized marijuana industry. *See, e.g.*, NRS 453D.020(3); NRS 453D.200(6). Careful background checks would assure that such crime was mitigated, even among publicly-traded companies.[6]

Thus, the drafters either could have purposefully omitted exceptions to the background check requirement for publicly traded companies for the aforementioned reasons involving the then-current logistics of the medicial marijuana industry; or they could have omitted it under the impression that publicly traded companies would not compete in this space in the near future due to federal law. Either way, both of these explanations show un-absurd reasons for requiring the Department to conduct background checks of shareholders of publicly traded companies.

NOR and Greenmart hastily declare that the Background Check requirement is unworkable because there is no easy way for the Department to background check shareholders of publicly traded marijuana companies, when in fact, the perceived difficulty could be the design, rather than a flaw, of the statute.

[6] It must be noted that if the Department's 5% Background Check regulation stands, a criminal may maintain a less than a 5% interest in an entity, avoid the Background Check requirement, and in some imaginable Operating Agreement may maintain some level of control over the licensed company.

As such, NOR's and Greenmart's entire argument focuses on the strain and burden this statute places on the Department, but in no way establishes why the purported strain is absurd. Aside from creating more difficulties for publicly-traded companies getting recreational marijuana licenses, there is no absurdity that results. To comply with the statute, the Department has two options: (1) it can decline to grant licenses to a publicly-traded company; or (2) it can devise a way to conduct the statutorily mandated background check on the owners of the publicly traded company. What it cannot do is pass a regulation that limits the statutorily mandated background check, and then have the intervening defendants ask this Court to substitute its own policy preferences for the plain language of the statute under the guise of preventing some "absurdity." This simply will not cut it. The legislature (and in this instance, the voters) created the law, not the Department. Even if the background check requirement is onerous, it is not absurd.

3. The plain language of the statute does not violate the spirit of the law.

Next, NOR and Greenmart argue that the plain language of the statute violates the spirit of NRS Chapter 453D. NOR AOB 32-37; Greenmart AOB 43-44. Again, NOR supports its assertion by stating that there is no statutory definition of the word "owner." But, as explained above, the plain language of this statute is easily discerned based on the common definition of the word "owner." *See Waste Management*, at 171, 443 P.3d at 1118 (applying dictionary definitions to common

terms when know statutory definitions were in place). NOR makes no effort to dispute the fact that the plain meaning of the statute can be discerned, but instead, NOR jumps to legislative intent and the "spirit of the law." Additionally, Greenmart makes no effort to show any ambiguity at all in the statute, prior to going to the spirit of the law.

In essence, NOR's argument is two-fold. First, NOR declares (citing a non-binding dissenting opinion) that if the drafters wanted to bar all publicly traded companies it would have expressed such a restriction in "straight forward English." NOR AOB 32. Second, NOR points to a series of unconnected statutes that contain percentage ownership language to assert that the drafters must have intended for recreational marijuana licenses to be regulated similarly. Both of these arguments fail because: (1) no one is arguing that the drafters intended to block all publicly-traded companies from participating in the marijuana industry; and (2) the existence of statutes that have language expressing ownership percentages for certain statutory language to apply to owners cuts against NOR's legislative intent argument because the drafters of this legislation had language that they could have used, but instead omitted.

As a general matter, a court should not impose special rules into ambiguous legislation based on silence alone. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 281 (2003); *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) ("[W]e

have held [that Congress] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). But in determining and creating a new regulatory scheme, the silence of drafters in the statutory language can be meaningful when language exists to effectuate the drafters' intent and the drafters decline to use such language. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995) (declining to fill the gaps to create a right to an appeal of an agency determination, when the statute failed to include common language granting the right to such an appeal); *cf. United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (noting an "audible" silence when the statute appears to go against a bedrock legal principle).

In fact, this Court has declined to create or lessen obligations based on statutory silence numerous times. *See State Dep't of Health & Human Servs. , Div. of Pub. & Behavioral Health Med. Marijuana Establishment Program v. Samantha Inc.*, 133 Nev. 809, 815, 407 P.3d 327, 331 (2017) (noting that the legislature deliberately omitted an appellate right from an agency decision, and declining to create such a right); *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 749, 918 P.2d 697, 701 (1996) (declining to apply a broad definition of "public interest" when the legislature was aware of the wording of that broad definition in other statutes and failed to include it in the statute); *see also S.*

Nevada Homebuilders Ass'n v. Clark Cty., 121 Nev. 446, 448, 117 P.3d 171, 172 (2005) (declining to add additional voting requirements beyond a majority vote when voting requirements were not outlined in the statute); *cf. Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 251 (2011) (declining to add a specialized burden of proof when the statute did not include one).

Here, the drafters of NRS 453D.200(6) clearly could have included a 5% ownership rule for background checks if they wanted to. As NOR aptly points out, numerous statutes that require certain actions or background checks for owners of entities, have language making such requirements applicable to only those with a certain percentage of interest in the entity. For example NOR selectively references NRS Chapter 453A, which regulates medical marijuana and contains language mandating that only those owners with a greater than 5% interest need to submit their finger prints for background checks. NRS 453A.322(5)(a)(1)-(2) (explaining that "a person [who] holds 5 percent or less of the ownership interest in any one medical marijuana establishment," need not submit their fingerprints for a background check). While NOR emphasizes the few similarities between NAC 453A.302(1) and NAC 453D.255(1), it wholly omits the fact that the enabling statute for medical marijuana regulation expressly includes the 5% ownership interest language and the enabling statute for recreational marijuana has no such language.

Similarly, all of NOR's other examples have **statutory language** that states that owners are considered those with a certain percentage of an ownership interest in the entity. *See* NRS 463.569(1); NRS 463.5735(1); NRS 463.643(3); NRS 463.014645(2)(b); 15 USC §78m(d)(1); NRAP 26(a)(1). NOR readily admits that these statutes contain language effectuating ownership percentages for certain restrictions on such owners. But NRS Chapter 453D contains no such language. If the drafters wanted to include the 5% ownership limitation to the background check requirement, they easily could have. Even though the drafters chose not to include it, NOR improperly asks this Court to add it after the fact. This is not how statutory interpretation works. And, respectfully, this is not the role of this Court. If the legislature seeks to make it easier to background check owners of publicly traded companies when they apply for recreational marijuana licenses, then it is free to do so pursuant to the restraints imposed upon it by the Nevada Constitution. But the Department has no such power to abrogate the plain language of the statute.

Even if the statute is ambiguous, nothing in the remaining statutory language indicates that owners are to include only those with a 5% ownership interest or greater in the company. NOR points to NRS 453D.200(1) which states that the Department must not prohibit the operations of marijuana establishments in its regulations. Additionally, NOR directs this Court's attention to NRS 453D.020 for

the proposition that businesses should be regulated in a manner similar to other legal businesses. Greenmart also points to these section of NRS Chapter 453D for the proposition that the plaint language of NRS 453D.200(6) goes against the plain language of the statute. These are odd arguments because many other legal businesses do not require background checks of any owners to procure a license. Further, NRS 453D.020(3)(b) specifically contemplates background checks on each business owner applying for licenses to produce or sell marijuana.

Strangely, NOR then attempts to liken this 5% rule to the regulations over liquor distributors. But the regulations and statutes involving liquor licenses (NRS Chapter 369 and NAC Chapter 369) have no background check requirement at all, and also have no 5% language. It is understandable that NOR wants this Court to read the 5% rule into the language of the statute based on the difficulty of background checking publicly-traded companies, since NOR is partially owned by such a company. Further, NOR may be correct that publicly traded companies are "the safest, best-organized, and most self-sufficient operators" of marijuana establishments (although NOR cites to no source to substantiate that assertion). NOR AOB at 36. But there is no indication that the drafters intended for background checks to apply only to those with a 5% ownership interest. And there is no indication that the drafters or the statutory scheme as a whole intended for the process to be easier for publicly traded companies. Forcing ambiguity into this

statute to allow the Department to eschew the background check requirement for owners with less than a 5% interest would amount to legislating by the Department. Therefore, NOR and Greenmart's arguments fail as a matter of law.

B. The Department is not Entitled to Any Deference.

NOR and Greenmart mistakenly frame their arguments around whether the district court erred by not giving deference to the Department. NOR AOB 23-26; Greenmart AOB 34-38. Nevertheless, the Department is entitled to deference, if, and only if, its interpretation is within the plain language of the statute. As such, ETW Plaintiffs follow the ordinary rules of statutory interpretation and begin with the plain language of the statute. After discerning the plain language of NRS 453D.200(6), the Department's interpretation clearly is outside of the language of the statute—and therefore is not entitled to deference.

A Nevada administrative agency may be afforded deference in its interpretation of an enabling statute giving it the authority to promulgate regulations, but this deference applies "only if the [agency's] interpretation is **within the language of the statute.**" *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union*, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008) (emphasis added). Meaning that the agency's interpretation must not conflict with the plain meaning of the statute, nor the legislature's intended construction of the statute. *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada,* 102 Nev. 1, 4, 711

P.2d 867, 869 (1986); *see also Nuleaf*, 134 Nev. at 133, 414 P.3d at 308 (holding that an agency's interpretation is entitled to deference unless it "conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious."); *Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990) ("[G]reat deference should be given to the agency's interpretation when it is within the language of the statute." (emphasis added)).

Additionally, even if deference to the agency could be proper, this Court "may decide purely legal questions without deference to an agency's determination," and therefore can "undertake [an] independent review of the construction of a statute." *Bacher v. Office of State Eng'r of State of Nevada*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). This is because the "interpretation of the statute by the agency charged with administration of the statute is persuasive," but not controlling. *Nevada Power Co.*, 102 Nev. at 4, 711 P.2d at 869.

Here, NOR makes no effort to show that the Department's interpretation is within the language of the statute. NOR gives no plain language analysis, nor does NOR make any attempt to define terms that it arbitrarily and in a conclusory manner determines to be "ambiguous." Certainly, there is no ambiguity when NRS 453D.200(6) states that "[t]he Department **shall** conduct a background check **of each prospective owner**, officer, and board member of a marijuana establishment license applicant." (emphasis added). As explained above, "owner" (and "each")

have clear definitions. This is unambiguous. Allowing the Department to enact a regulation contrary to the plain language of the statute would amount to legislation by the executive branch - no deference is warranted.

NOR also argues that the district court erred by failing to give the Department deference because of Article 19, section 2, clause 3 of the Nevada Constitution. While it is true that the district court mentioned this constitutional provision, NOR completely overstates the district court's reliance on it in denying the Department deference. Just one look at the Preliminary Injunction Order shows that the district court found that the plain language of the statute compelled the Department to background check each owner. The district court explained that "[t]he [Department's] decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5% prior to award of a conditional license is an **impermissible deviation** from the mandatory language of BQ2, which mandated 'a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant.'" *See* RA Vol. X, at 1926:4-9 (emphasis added).

Greenmart repeats NOR's argument nearly verbatim. Greenmart AOB 38-41. But Greenmart also adds the fact that, under federal deference principles, an administrative agency is given even more deference when interpreting a new statutory scheme. Greenmart AOB 39 (*citing TexacoInc. v. Dep't of Energy*, 663

F.2d 158, 165 (D.C. Cir. 1980)). Putting aside the fact that federal deference standards are substantially different than the state deference standards,[7] and putting aside the fact that federal deference standards have weakened significantly since the 1980 case it cites,[8] this argument is completely inapplicable to the factual situation of this case. The fact of the matter is that the Department cannot go beyond the language of the enabling statute and be entitled to any deference. *See, e.g.*, *Collins Disc. Liquors & Vending*, 106 Nev. at 768, 802 P.2d at 5. Additionally, the district court, as well as this court, may "undertake [an] independent review of the construction of a statute" when interpreting whether regulation is consistent with the enabling statute. *Bacher*, 122 Nev. at 1117, 146 P.3d at 798. Thus, Nevada law gives no special deference to an agency interpretation of a new statute. Rather, the Department's regulation can never go beyond the language of the enabling statute. And if they do, then the Department's

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[7] *See* Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 79 MCGEORGE L. REV. 977, 984-85, 1018 (2008) (explaining that state deference to agency interpretations range from strong deference to de novo review and that Nevada courts utilize intermediate deference in which they reserve the right to review legal questions *de novo*).

[8] *See* Jowanna N. Oates, *Saying Goodbye to Chevron and Auer: New Developments in Agency Deference Doctrine*, 91 FLORIDA BAR J. 6, 43 (2017) ("Nevertheless, it appears that at the federal level, the agency deference doctrine may be, as Justice Thomas remarked, 'on its last gasp.'"); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2410-11 (2019) (gutting *Auer* Deference).

interpretation is entitled to *no* deference. So, even assuming that federal case law that Greenmart cites is current (it is not), Nevada law differs from the federal standards that Greenmart relies on.

Thus, because the regulation conflicts with NRS 453D.200(6), the regulation is invalid, and amounted to a change of the plain language of the statute that the Department was required to enforce. Thus, the district court interpreted the plain language of the statute to conflict with the Department's regulation, and therefore invalidated it. This was not an invalid application of the law because the Department's regulation fell outside the plain language of the statute. Therefore, the Department's regulation was not entitled to any deference, and the district court did not err by declining to give deference to the Department's interpretative authority in enacting the 5% threshold. Holding otherwise would allow the Department to unlawfully amend the statutory language of a ballot initiative in violation of Article 19, Section 2 of the Nevada Constitution.

C. ETW Plaintiffs Have Standing to Pursue their Claims.

NOR and Greenmart argue that plaintiffs lack standing because they allegedly incurred no injury. NOR AOB 37-39; Greenmart AOB 26-29. Even though NOR did not raise this argument in the district court, ETW Plaintiffs recognize that this is a jurisdictional question, and address it notwithstanding this

error.[9] This standing argument is completely unsubstantiated and should be summarily rejected.

At the outset, NOR and Greenmart rely on a footnote in the 1996 case *Miller v. Ignacio*, 112 Nev. 930, 936 n.4, 921 P.2d 882, 885 n.4 (1996), in which this Court indicated, in dicta, that it would follow the federal standing standard. Since then, this Court has held that strict federal standing requirements do not need to be met for a plaintiff to have standing in Nevada state courts. *See Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) ("[S]tanding is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."). Thus, ETW Plaintiffs are not compelled to show the federal constitutional standing components of injury, causation, and redressability. *Id.*

Instead, ETW Plaintiffs must show that a justiciable controversy in which parties have an interest in the underlying claims and defenses exists. *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (explaining the state justiciability requirements in the context of a declaratory judgment claim). In other

[9]Greenmart did raise the standing issue in the district court.

words, to have standing a party must have some sort of beneficial interest in the litigation. *See Heller v. Legislature of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) This Court long ago defined a justiciable controversy for purposes of declaratory relief as "a controversy in which a claim of right is asserted against one who has an interest in contesting it." *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). Indeed, NRS 30.040(1) requires only that a person's "rights, status or other legal relations [be] affected by a statute" to be entitled to "determin[ation of] any question of construction or validity arising under the . . . statute. . .[and to] obtain a declaration of rights, status or other legal relations thereunder."

Here, the ETW Plaintiffs have a beneficial interest to bring this claim due to the fact that they were harmed by the Department's abject failure to properly enforce the statutory mandates of NRS Chapter 453D. The district court found, in its FFCL, that **several** of the actions taken by the Department during the application process, including failure to background check each owner of the applicants prior to issuing the licenses, were "fatal to the application process." *See* RA Vol. X, at 1919:17-1920:18. ETW Plaintiffs have standing to challenge the Department's unlawful actions because the actions directly contributed to the issuance of licenses in violation of the statute to entities that should not have been awarded licenses, instead of ETW Plaintiffs. It thereby affected the competitive

bidding process for licenses, in which ETW Plaintiffs were competitors. Additionally, ETW Plaintiffs have a reasonable expectation that the Department will follow the statute in promulgating the regulations that constitute the competitive bidding process, which they were in competition for a recreational license. Thus, the ETW Plaintiffs are clearly interested parties in this litigation, based on their injury that resulted from the Department not following the enabling statute.

NOR attempts to preempt this injury argument by relying on *Hauer v. BRDD of Indiana, Inc.*, 654 N.E.2d 316 (Ind. Ct. App. 1995), for the proposition that standing cannot be asserted for an injury that the law was not designed to protect. NOR AOB 38 n.12. Greenmart makes an identical argument, also claiming that ETW Plaintiffs have no injury based on a similar rationale. Greenmart AOB 27 -28. This *Hauer* case is completely inapposite, and the ETW Plaintiffs have a cognizable injury. In *Hauer*, an Indiana appellate court held that a permitted firework distributor did not have a property interest in certificates of compliance issued to competitors in order to have standing to enjoin the issuance of such certificates. *Id.* at 319. The court determined that the purpose of the statute relating to certificates of compliance that the firework distributor attempted to rely on was to assure citizen safety by instituting safeguards. *Id.* Here, on the other hand, ETW Plaintiffs do not allege that they have a property interest in any of the intervening

defendant's retail licenses. Instead, ETW Plaintiffs have a statutory right to an impartial and fair competitive bidding process, by which the licenses are awarded. This competitive bidding process was sullied by the Department's abrogation of NRS Chapter 453D's provisions. This resulted in some applicants being awarded licenses that they were not entitled to, and in some entities being denied licenses that they should have been awarded. Thus, this injury is directly related and arising out of the Department's passage of regulations that directly contravene the enabling statute.

Moreover, NRS 30.040 grants ETW Plaintiffs standing to have the district court declare their rights under NRS Chapter 453D. Additionally, NRS 34.160 gives ETW Plaintiffs statutory standing to seek writ relief from the district court to ensure that the Department follows NRS Chapter 453D. As such, several statutes also give ETW Plaintiffs independent statutory standing to bring this lawsuit.

Greenmart adds another argument that is completely irrelevant to the case at hand. Greenmart argues that NRS Chapter 233B.130 bars ETW Plaintiffs from bringing a petition for judicial review because (1) the application process was not a contested case; and (2) ETW Plaintiffs did not identify every affected party as required by NRS 233B.130.

This argument is completely irrelevant to the case at hand. ETW Plaintiffs, at this stage in the litigation in district court, had not brought a petition for judicial

review. *See* RA Vol. III, at 0494. Greenmart erroneously states that ETW Plaintiffs included a petition for judicial review prior to the preliminary injunction order and cites to the TGIG Parties' operative complaint. *See* Greenmart AOB 29 (*citing* 29 Appellant's Appendix (AA) 7149-50). Admittedly, and with full candor to this Court, ETW Plaintiffs do allege a petition for judicial in their current operative complaint. But this is outside of the record on the current appeal. Moreover, the district court had not yet made any determination as to whether the petition for judicial review was proper in this instance in the record before this Court. As explained above, ETW Plaintiffs satisfy the standing requirements generally to bring their claims, as there is an injury based on the Department's alleged actions in eschewing the enabling statute when promulgating their regulations. As such, this Court need not delve into this issue here, and should decline to consider this argument.

Ultimately, ETW Plaintiffs are parties to a live controversy, which they are beneficially interested in, and thereby meet Nevada's standing requirement. ETW Plaintiffs also suffered an injury, by way of being a party to an application process that did not comply with NRS Chapter 453D and led to numerous illicit recreational marijuana licenses being issued. Thus, ETW Plaintiffs have standing.

D. The District Court did not Abuse its Discretion by Declining to Apply the Doctrine of Laches and Equitable Estoppel Does Not Bar ETW Plaintiffs' Claims.

NOR and Greenmart assert that it suffers prejudice due to ETW Plaintiffs' waiting to challenge the 5% rule (along with the other deficiencies in NAC Chapter 453D) until after the licenses were issued. NOR AOB 39-41; Greenmart AOB 50-51. Specifically, NOR bemoans the fact that they would have waited to transfer ownership to a publicly traded company until after the application deadline. NOR AOB 40. While NOR was seemingly unable to evade the rules as properly interpreted, this should not bar ETW Plaintiffs from recovery. Greenmart merely states that it is potentially in danger of losing this litigation, but makes no argument as to why waiting until after to the application process makes this danger any more apparent. Greenmart AOB 50-51.

"Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, **causing a change of circumstances** which would make the grant of relief to the delaying party inequitable." *Bldg. & Const. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992) (emphasis added). To show that the doctrine of laches applies, three elements must be met: "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether

the inexcusable delay was prejudicial to others." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008).

Here, the district court did not abuse its discretion by declining to apply the doctrine of laches. This is evident because none of these elements are met. First, ETW Plaintiffs did not inexcusably delay bringing this challenge. ETW Plaintiffs brought their challenge less than a month after their applications were denied. There is no strict timeline that ETW Plaintiffs had to follow in challenging such denials under the applicable statutes and regulations. Second, ETW Plaintiffs never acquiesced to the promulgated regulations. Again, ETW Plaintiffs waited to challenge the regulations until there was a justiciable controversy. Finally, ETW Plaintiffs' delay did not prejudice NOR or Greenmart, the Department, or any other entity. This lawsuit would have had similar, if not the same, implications if it was brought prior to the issuance of the licenses or after the issuance. NOR still would have had a purchaser set up to purchase its interests in the company, and since the prospective owners were known at the time of the application, arguably NOR would still have had an ethical duty to disclose these prospective owners prior to the issuance of a license. The fact that ETW Plaintiffs stopped NOR from skirting the rules was not planned for ETW Plaintiffs' benefit at all. Greenmart would still have had a publicly-traded parent company if ETW Plaintiffs had challenged these regulations earlier in the process, and still would have been

potentially blocked from receiving a license. Thus, laches is inapplicable in this case.

In contrast, equitable estoppel "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.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005). Equitable estoppel has four elements that need to be met for it to apply: (1) the party to be estopped must be apprised of the true facts; (2) the party being estopped must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *Id.*

The district court also did not abuse its discretion by declining to apply the doctrine of equitable estoppel. In this case, this test seems largely inapplicable, but ETW Plaintiffs provide analysis nonetheless. A majority of the elements of the equitable estoppel tests are not met. For instances, element two is not met because ETW Plaintiffs did not intend to harm NOR or Greenmart by applying for a marijuana license despite the fact that the 5% rule was in place. Thus, the second element is not met. Element three is also not met because NOR was not ignorant to the fact that the 5% regulation was in place or that it was contradictory to NRS 453D.200(6). Finally, element four is not met because NOR and Greenmart did

not rely on any promise that ETW Plaintiffs would not challenge the 5% rule after the application process was completed, when ETW Plaintiffs had standing to challenge this regulation. Thus, elements 2, 3, and 4, of the equitable estoppel test are not met, resulting in no abuse of discretion. As such, this Court should deny NOR's equitable estoppel defense.

E. Irreparable Harm is Readily Apparent.

NOR next contends that a preliminary injunction was not appropriate because the district court did not adequately articulate an irreparable harm that would result if the injunction was not granted. NOR AOB at 41-43; Greenmart, at 45-46.

Greenmart indicates in passing that the loss of market share might not constitute the requisite harm, but it fails to perform any meaningful analysis and reverts back to the claim that the FFCL does not sufficiently specify the irreparable harm. Greenmart, at 46-47.[10]

[10] Greenmart's claim is misplaced because it is well established throughout many jurisdictions that a constitutionally protectable property interest exists regarding the current market share of a going legitimate business. *Merced Irrigation District v. Barclay's Bank PLC*, 165 F. Supp. 3d 122, 144 (S.D.N.Y., 2016); *see also Grand River Enterprises Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2nd Cir. 2011); *Novartis Consumer Health Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals*, 290 F.3d 578, 596 (3rd Cir. 2002); *In re Goldcoast Partners, Inc. v. Nationsbank N.A.*, 1998 WL 34069489 (Bat-11u S.D. Fla. 1998) ("The Bank's lien applied to the Debtor's intangible property rights—goodwill going concern value, and market share value—and therefore the Bank's lien also applied to the proceeds from the sale of those rights."); *In re SRJ Enterprises, Inc.*, 150 B.R. 933,

The irreparable harm element for the Preliminary Injunction is satisfied because the deprivation of constitutional rights is readily apparent from the record. A preliminary injunction is granted upon the requesting party showing: (1) it has a reasonable probability of success on the merits; and (2) there is a reasonable probability that the non-moving party's continued conduct will result in irreparable harm, for which compensatory damage is an inadequate remedy. *Camco*, 113 Nev. at 516, 936 P.2d at 831; *University and Community College System of Nevada*, 120 Nev. at 721, 100 P.3d at 187. In granting a preliminary injunction, "the district court may also weigh the public interest and the relative hardships of the parties." *Clark County School Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996); *University and Community College System of Nevada*, 120 Nev. at 721, 100 P.3d at 187. Irreparable harm is an injury that cannot be adequately measured

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940-41 (Bankr. N.D. Ill. E.Div. 1993). Nevada also recognizes a statutorily protected property interest in a business's market share from being harmed by unfair competition in NRS 598A. If that property right is lost by means of a business competing with a constitutionally invalid license, then it was governmental action that caused it to occur.

It is axiomatic that as that statute is intended to protect businesses which benefit from a competitive market and from unfair competition, the State may not abrogate that protection without affording due process of law. NRS 598A.030-.040. Lost market share by a business competitor as a result of the conduct of the competing business operating pursuant to an invalid license is an injury sufficient to establish a claim under NRS 598A. *Law Offices of Matthew Higbee v. Expungement Assistance Servs.*, 214 Ca1.App.4th 544, 565 (Cal. Ct. App. 2015). Consequently, ETW Plaintiffs would suffer irreparable harm by being deprived of a constitutionally protected property interest.

or compensated by money. *Irreparable Harm*, BLACK'S LAW DICTIONARY (9th ed. 2009); *see also Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987).

Notwithstanding the generally accepted elements, the requirements for injunctions are not "jurisdictional, but, rather, as intended primarily to facilitate appellate review of injunctive orders." *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990). Accordingly, "the lack of a statement of reasons does not necessarily invalidate a[n] [] injunction, so long as the reasons for the injunction are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful appellate review." *Id.* at 118, 787 P.2d at 775.

Indeed, "mandatory nullification of any injunctive order not containing a statement of reasons can operate to penalize parties with additional litigation due to failure by the trial judge to perform a duty which, in large part, is his or her responsibility." *Id.* Nev. at 119, 787 P.2d at 776. "To mandate nullification as a matter of course would therefore violate the requirements that the Nevada Rules of Civil Procedure be construed to secure the just, speedy, and inexpensive determination of every action." *Id.* As a result, all cases that require invalidation of an injunction "solely for lack of a statement of reasons" have been overruled. *Id.* Nev. at 118-19, 787 P.2d at 775-76.

In granting preliminary injunctions, "it is well established that the

deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). In fact, even an "alleged constitutional infringement will often alone constitute irreparable harm." *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (1984). Moreover, mere representations made during a hearing that show a real possibility of constitutional deprivation form a reasonable basis for granting an injunction and will survive an abuse of discretion analysis. *Melendres*, 695 F.3d at 1002.

Here, the record shows the district court determined that the Department's modification of NRS 453D.200(6) and adoption of NAC 453D.255(1) violated Article 19, Section 2 of the Nevada Constitution. *See* RA Vol. X, at 1919:17-1920:8, 1926:1-26. The district court also expressly found that no right to appeal or review of the denial of recreational marijuana licenses was provided in NRS Chapter 453D or NAC Chapter 453D, and that the number of authorized recreational marijuana licenses is extremely limited. *Id.* at 1921:4-10. In addition, the district court recognized that it does not have authority to order additional licenses in particular jurisdictions. *Id.* at 1921:11-15.

In short, without the Preliminary Injunction to maintain the status quo, there will be no licenses available to award any plaintiffs in this matter. Thus, a

successful plaintiff that shows it should otherwise be awarded a license would still be deprived of its constitutionally protected interest as a successful applicant. This amounts to irreparable harm. Furthermore, this deprivation of a constitutionally protected interest would be the result of an application process that also violated the Nevada Constitution. Under the totality of the circumstances, irreparable harm is readily apparent from the record.

F. The District Court Properly Applied the Preliminary Injunction.

The Preliminary Injunction was applied equally and should not be disturbed. In addition, NOR and Greenmart have failed to cite any controlling or persuasive law to support its assertion that the Preliminary Injunction was applied arbitrarily and capriciously and is properly disregarded. A judicial decision is "arbitrary" if it is founded on prejudice or preference rather than on reason or fact, and it is "capricious" if it is contrary to the evidence or established rules of law. Black's Law Dictionary 119, 239; *Eighth Judicial Dist. Ct.*, 127 Nev. at 931, 267 P.3d at 780; *Franklin*, 95 Nev. at 562-63, 598 P.2d at 1149.

Additionally, a deprivation of due process only occurs if the claimant is denied the opportunity to be heard at a meaningful time and in a meaningful manner. *University of Nevada v. Tarkanian*, 95 Nev. 389, 397-98, 594 P.2d 1159, 1164 (1979) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Furthermore, the district court's conduct must shock the conscience. *United States v. Salerno*,

481 U.S. 739, 742 (1987); *Corales v. Benett*, 567 F.3d 554, 569 (9th Cir. 2009). The requirement to be heard at a meaningful time and in a meaningful manner is satisfied when there has been some form of hearing before the alleged property interest is purportedly deprived. *Mathews*, 424 U.S. at 333.

In this case, the Preliminary Injunction as drafted by the district court enjoined the Department from conducting final inspection of any of the conditional licenses issued to entities that did not provide the identification of each prospective owner, officer, and board member, as required by NRS 453D.200(6). The order applied equally to all applicants, without preference, and the district court did not determine which applicants complied with NRS 453D.200(6).

Under its authority and using the records in its sole possession and control, the Department assessed the applications and concluded that it could not represent that NOR, Greenmart, and others supplied sufficient information to comply with NRS 453D.200(6). The Department had the authority, was best situated to make that determination, and expressly stated its neutrality and objectivity in performing the analysis. The district court deferred to the Department's judgment and used the findings as the factual basis for application of the Preliminary Injunction.

In addition, before applying the Preliminary Injunction, the district court provided NOR the opportunity to be heard regarding the Department's determination in the Additional Hearing. Unconvinced by NOR's argument at the

Additional Hearing, the district court accepted the Department's findings and expressly adopted them as findings of fact. *See* RA Vol. X, at 1920:9-12, n. 15.

The findings of fact and Preliminary Injunction were equally applied to all parties. As findings of fact, they are not disturbed unless they are clearly erroneous and unsupported by substantial evidence. *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC,* 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). NOR does not discharge its burden to show the findings of fact are based on clear error and that they are not supported by substantial evidence. Although NOR asserts it disclosed all "owners" as the term has always been understood, it does not provide a definition or analysis of what constitutes an owner for the purposes of NRS 453D.200(6). *See* NOR AOB., at 43-44.

Additionally, NOR and Greenmart were heard at a meaningful time and in a meaningful manner in their respective Pocket Briefs and during the Additional Hearing. Because NOR and Greenmart were heard at a meaningful time and in a meaningful manner, and failed to demonstrate the findings of fact at issue are clearly erroneous and unsupported by substantial evidence; NOR's and Greenmart's arguments are properly disregarded.

IX. CROSS-APPEAL.

A. The Department's Unilateral Change to the Physical Location Requirement Violated the Nevada Constitution.

1. The Plain Language of the Statute Requires a Physical Location.

NRS 453D.210(5) states, in relevant part, that: "The Department shall approve a license application if . . . [t]he physical address where the proposed marijuana establishment will operate is owned by the applicant or the applicant has the written permission of the property owner to operate the proposed marijuana establishment on that property." Moreover, for the application to be granted, this physical location cannot be within a certain distance from a school, community center, or a gaming establishment with a non-restricted license. NAC 453D.268(1)(e) also requires an application to contain "[t]he physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishment." In addition, Article 19, Section 2, Clause 3 of the Nevada Constitution prohibits resolutions like BQ2 from being "amended, annulled, repealed, set aside, suspended, or in any way made inoperative except by direct of the people" for three years after enactment. Nev. Const. art. XIX, § 2, cl. 3.

Applying the principles of statutory interpretation to this statute and regulation makes the plain meaning clear from the outset. The first clause of NRS 453D.210(5) states that the Department **shall** approve a license if the physical

address is listed. As analyzed in greater detail above, the word "shall" "imposes a duty to act." *Pasillas*, 127 Nev. at 467, 255 P.3d at 1285. Thus, with the use of the word shall, the plain language of this statute indicates that the applicants were required to list a physical location that they either owned or had the property owner's written permission to use as a marijuana establishment. The plain language of the regulation is also clear when it says that the application "must include" the physical address where the proposed marijuana establishment will be located.

In addition, nobody, including the department, denies that the Department removed the Physical Location requirement. The Department asserted that it had statutory authority to amend the provisions of BQ2 as "necessary or convenient" to implement the application process under NRS 453D.200(1). Essence asserted that in addition to the "necessary or convenient" authority, *Nuleaf* requires great deference to the Department's decisions without limitation. Essence relies upon *Nuleaf* for the proposition that the physical location is not required, even though both the statute and the regulations mandate that a physical location be submitted with an application. Yet the *Nuleaf* case is not analogous to the case at hand—aside from the fact that it deals with marijuana licensure in Nevada—because it does not involve the same statute, a similar statutory provision, or even a similar legal issue.

The issues in *Nuleaf* involved whether NRS 453A.322(3)(a)(5) required that

the Department of Health and Human Services (the "State") had to wait to issue a registration certificate (the equivalent of a license under NRS Chapter 453D) until the establishment obtained approval from the local government certifying that it was in compliance with the zoning laws. *Nuleaf*, 134 Nev. at 131, 414 P.3d at 307. Under NRS 453A.322(3)(a)(5), the State was required to issue a registration certificate within 90 days after receiving the application, if, among other things, the local government sent a letter to the State certifying compliance with zoning laws. *Id.* The applicant did not receive a letter of compliance from the City, but despite that fact still received a registration certificate from the State. *Id.* One of the losing applicants sued, alleging that the State issued a registration certificate in violation of the statute. *Id.*

The Court determined that the letter requirement was ambiguous, partly because NRS 453A.328 characterized NRS 453A.322's requirements as factors to consider, and partly because NRS 453A.326(3) stated that an issued registration certificate "*shall be deemed provisional* until such time as the establishment is in compliance with all applicable local governmental ordinances or rules." *Id.* at 134, 414 P.3d at 309. The fact that there was a provision in the statute to make the registration certificate provisional if all local laws were not complied with, coupled with the statute's characterization of these requirements as factors to consider, effectively created ambiguity in the facially mandatory language of NRS

453A.322. Given this ambiguity, the Supreme Court held that the State could issue a registration certificate, which would then be provisional, even if the city or local government did not send a letter of compliance. *Id.* at 136, 414 P.3d at 311. The rationale for this holding is key—the Supreme Court reasoned that to hold to the contrary would create an absurd result, in which local governments could effectively block otherwise qualified medical marijuana applicants from receiving a registration certificate, thereby effectuating political control over the State. *Id.* at 135, 414 P.3d at 310.

ETW Plaintiffs' argument is simply that *Nuleaf* should not apply to this set of facts and this statute. None of the factors that led the Nevada Supreme Court to find that the statute was ambiguous, let alone to find that the letter requirement is discretionary, are present in NRS 453D.210(5)'s requirements. There is nothing indicating that NRS 453D.210's requirements are discretionary; in fact the use of the word "shall" indicates the contrary. There is no provision that a local government has to issue any letter to satisfy the Physical Location requirement. There is no indication in NRS Chapter 453D that NRS 453D.210(5)'s requirements are merely factors to be considered, as is the case in NRS Chapter 453A. Indeed, NRS 453A and NRS 453D have too many difference and distinctions for *Nuleaf* to apply here. The most analogous provision in NRS 453A to NRS 453D is NRS 453A.322(3)(a)(2)(II), which requires applicants for medicinal marijuana

registration certificates to list a physical address. In both statutes, the physical address requirement is necessary to submit a complete application. This provision, however, was not at issue in *Nuleaf*, and the Supreme Court did not rule that the provision was not mandatory.

Given these distinctions, it is apparent that the Department violated the law by allowing the issuance of licenses to entities that did not have a physical location listed on their application. Without such a location listed, the Department could not accurately determine, as the ballot initiative voters intended, if the location of the proposed recreational marijuana establishment would be too close in proximity to a school, community center, or gaming establishment. *See* NRS 453D.210(5)(c).

2. The Physical Location Requirement was Part of Scoring and the Impartial and Competitive Bidding Process.

The purpose of state controlled competitive bidding and competitive application processes is "to secure competition, save public funds, and to guard against favoritism, improvidence, and corruption." *Gulf Oil Corp. v. Clark Cty.*, 94 Nev. 116, 118-19, 575 P.2d 1332, 1333 (1978); *see also City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 758, 191 P.3d 1175, 1181 (2008). The statutes and regulations that govern competitive bidding and application processes are "for the benefit of the taxpayers" and should "be construed for the public good." *Gulf Oil*, 94 Nev. at 118-19; *Richardson Constr. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 66, 156 P.3d 21, 24 (2007).

As a result, providing only some participants information that is not available to all, demonstrates favoritism and deprives all applicants of the same opportunity and defeats the purpose and integrity of the competitive bidding process. *Id.*; *see also Spiniello Const. Co. v. Town of Manchester*, 189 Conn. 539, 544, 456 A.2d 1199, 1202 (1983). Hence, "[a]n awarding board has a duty to reject any bid materially varying from bid specifications." *Faust v. Donrey Media Grp.*, 95 Nev. 235, 237, 591 P.2d 1152, 1154 (1979). This "preserve[s] the competitive nature of bidding by preventing unfair advantage to any bidder, or other conditions undermining the necessary common standard of competition," "save public funds and guard against favoritism, improvidence and corruption." *Id.* at 238 n.1; *Richardson*, 123 Nev. at 66, 156 P.3d, at 24.

In this case, NRS 453D permitted the Department to approve only complete license applications, which expressly required providing a physical location. NRS 453D.200(2), 210(4)-(5). The Department was also required to "use an impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." NRS 453D.210(6). As such, the physical location requirement was an express part of BQ2 and the scoring and impartial competitive bidding processes. Moreover, the requirements of BQ2 could not be amended in any way for three years without a vote by the people.

Notwithstanding, the Department unilaterally changed the physical location requirement and shared the change with only some applicants. By doing so, the Department demonstrated favoritism, undermined the purpose and integrity of the competitive bidding process, and, most importantly, violated the Nevada Constitution.

The district court held that the Department's elimination of the physical location requirement was "not an appropriate basis for the requested injunctive relief," even though it expressly held that the Department's modification of BQ2 provisions violated Article 19, Section 2, Clause 3 of the Nevada Constitution as "deviations [that] constituted arbitrary and capricious conduct without any rational basis for the deviation" and determined the Department's actions would cause the Plaintiffs irreparable harm. *See* RA Vol. X, at 1925:7-20, 1926:1-23. Accordingly, the district court erred in finding that the Department's amendment to the physical location requirement did not violate the Nevada Constitution and would not cause the Plaintiffs irreparable harm.

X. CONCLUSION.

Accordingly, ETW Plaintiffs respectfully request that this Court decline to reverse the district court's grant of a preliminary injunction. It is readily apparent that the background check regulation exceeded the scope of the enabling statute, and that the district court did not otherwise abuse its discretion in granting the

preliminary injunction.

ETW Plaintiffs also respectfully request in its appeal that this Court give due regard to the many differences and distinctions between this case and *Nuleaf,* and find that it does not control here. On that basis, ETW Plaintiffs ask this Court to uphold the plain language of NRS 453D.210(5) that requires an applicant to include on its application a Physical Location for each proposed marijuana establishment and remand this case to the district court, requiring that the district court issue an injunction as to any applicant that did not comply with that requirement.

DATED this 19th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

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

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

I further certify that this Answering Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 18,341 words.

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

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

DATED this 19th day of June, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **Respondents' Answering Brief and Opening Brief on Cross Appeal** was filed electronically with the Nevada Supreme Court on the 19th day of June, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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