IN THE SUPREME COURT OF THE STATE OF NEVADA

****

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 Nevada limited liability company;

SUPREME COURT CASE NO. 79669

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

RESPONDENTS' APPENDIX
VOLUME X

[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.

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.

/ / /

/ / /

/ / /

/ / /

RESPONDENTS' APPENDIX
VOLUME X

BROWNSTEIN HYATT FARBER SCHRECK, LLP
ADAM K. BULT, ESQ., Nevada Bar No. 9332
MAXIMILIEN D. FETAZ, ESQ., Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800
100 N. City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382-2101
Facsimile: 702.382.8135

JENNINGS & FULTON, LTD.
ADAM R. FULTON, ESQ., Nevada Bar No. 11572
2580 Sorrel Street
Las Vegas, NV 89146
Telephone: 702.979.3565
Facsimile: 702.362.2060

Attorneys for ETW MANAGEMENT GROUP LLC, GLOBAL HARMONY LLC, GREEN LEAF FARMS HOLDINGS LLC, GREEN THERAPEUTICS LLC, HERBAL CHOICE INC., JUST QUALITY, LLC, LIBRA WELLNESS CENTER, LLC, ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, NEVCANN LLC, RED EARTH LLC, THC NEVADA LLC, ZION GARDENS LLC, and MMOF VEGAS RETAIL, INC. (collectively, "ETW Parties")

RESPONDENTS' APPENDIX (ALPHABETICAL)

BROWNSTEIN HYATT FARBER SCHRECK, LLP
ADAM K. BULT, ESQ., Nevada Bar No. 9332
MAXIMILIEN D. FETAZ, ESQ., Nevada Bar No. 12737
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800
100 N. City Parkway, Suite 1600
Las Vegas, NV 89106
Telephone: 702.382-2101
Facsimile: 702.382.8135

JENNINGS & FULTON, LTD.
ADAM R. FULTON, ESQ., Nevada Bar No. 11572
2580 Sorrel Street
Las Vegas, NV 89146
Telephone: 702.979.3565
Facsimile: 702.362.2060

Attorneys for ETW MANAGEMENT GROUP LLC, GLOBAL HARMONY LLC, GREEN LEAF FARMS HOLDINGS LLC, GREEN THERAPEUTICS LLC, HERBAL CHOICE INC., JUST QUALITY, LLC, LIBRA WELLNESS CENTER, LLC, ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, NEVCANN LLC, RED EARTH LLC, THC NEVADA LLC, ZION GARDENS LLC, and MMOF VEGAS RETAIL, INC. (collectively, "ETW Parties")

Document Description	Volume
Amended Application for Mandamus to Compel State of Nevada, Department of Taxation to Move Nevada Organic Remedies into "Tier 2" of Successful Conditional License Applicants (November 11, 2019)	Volume XI RA2002 – 2056
E-mail from Mr. Shevorski (August 21, 2019)	Volume X RA1902 – 1904
ETW Plaintiffs' Complaint (January 4, 2019)	Volume I RA0179 – 250
ETW Plaintiffs' Complaint – Continued (January 4, 2019)	Volume II RA0251 – 493
ETW Plaintiffs' Second Amended Complaint (May 21, 2019)	Volume III RA0494 – 743
ETW Plaintiffs' Second Amended Complaint – Continued (May 21, 2019)	Volume IV RA0744 – 814
Evidentiary Hearing – Day 4 Transcript (May 30, 2019)	Volume V RA0815 – 1057
Evidentiary Hearing – Day 6 Transcript (June 10, 2019)	Volume VI RA1058 – 1282
Evidentiary Hearing – Day 7 Transcript (June 11, 2019)	Volume VIII RA1350 – 1600

Evidentiary Hearing – Day 7 Transcript – Continued (June 11, 2019)	Volume IX RA1601 – 1602
Evidentiary Hearing – Day 17 Transcript (August 13, 2019)	Volume IX RA1603 – 1694
Evidentiary Hearing – Day 20 Transcript (August 16, 2019)	Volume X RA1735 – 1901
Findings of Fact and Conclusion of Law Granting Preliminary Injunction (August 23, 2019)	Volume X RA1905 – 1928
Google Maps Photo (June 11, 2019)	Volume VII RA1344 – 1346
Governor's Task Force on the Implementation of Question 2: The Regulation and Taxation of Marijuana Act (May 30, 2017)	Volume I RA0001 – 162
GreenMart of Nevada NLV's Trial Memorandum (August 15, 2019)	Volume IX RA1714 – 1723
Hearing on Objections to State's Response, Nevada Wellness Center's Motion Re Compliance Re Physical Address, and Bound Amount Setting (August 29, 2019)	Volume XI RA1929 – 2001
Nevada Organic Remedies' Organizational Chart (2018)	Volume I RA0163 – 178
Nevada Organic Remedies' Pocket Brief Regarding the Interpretation of NRS 435D.200(6) and the Mandate to Conduct Background Checks of Each Owner of an Applicant for a Recreational Marijuana License (August 14, 2019)	Volume IX RA1695 – 1713
Notice of Entry of Order Denying Amended Application for Writ of Mandamus to Compel State of Nevada, Department of Taxation to Move Nevada Organic Remedies into "Tier 2" of Successful Conditional License Applicants (January 14, 2020)	Volume XI RA2057 – 2062
State of Nevada Pocket Brief Regarding the Meaning of the Phrase "All Regulations Necessary or Convenient to Carry Out the Provisions of" (June 10, 2019)	Volume VII RA1283 – 1343
The Essence Entities' Bench Brief (Corrected) (August 15, 2019)	Volume IX RA1724 – 1734
UPS Store Address (June 11, 2019)	Volume VII RA1347 - 1349

DATED this 19th day of June, 2020.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Adam K. Bult
ADAM K. BULT, ESQ., NV Bar No. 9332
MAXIMILIEN D. FETAZ, ESQ., NV Bar No. 12737
TRAVIS F. CHANCE, ESQ., NV Bar No. 13800

JENNINGS & FULTON, LTD.
ADAM R. FULTON, ESQ., Nevada Bar No. 11572
Attorneys for ETW Parties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **RESPONDENTS' APPENDIX VOLUME X** 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:

David R. Koch
Steven B. Scow
Daniel G. Scow
Brody R. Wight
KOCH & SCOW, LLC

Counsel for Appellant/Cross-Respondent Nevada Organic Remedies, LLC

Margaret A. McLetchie
Alina M. Shell
MCLETCHIE LAW

Counsel for Appellant GreenMart of Nevada NLV, LLC

Ketan D. Bhirud
Aaron D. Ford
Theresa M. Haar
David J. Pope
Steven G. Shevorski
OFFICE OF THE ATTORNEY GENERAL

Counsel for Respondent The State of Nevada Department of Taxation

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

Electronically Filed
8/20/2019 12:22 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SERENITY WELLNESS CENTER LLC, et al. Plaintiffs vs. STATE OF NEVADA DEPARTMENT OF TAXATION Defendant	CASE NO. A-19-786962-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 20

FRIDAY, AUGUST 16, 2019

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFFS:	DOMINIC P. GENTILE, ESQ. MICHAEL CRISTALLI, ESQ. ROSS MILLER, ESQ. WILLIAM KEMP, ESQ. NATHANIEL RULIS, ESQ. ADAM BULT, ESQ. MAXIMILIEN FETAZ, ESQ. THEODORE PARKER, ESQ.
FOR THE DEFENDANTS:	KETAN BHIRUD, ESQ. STEVE SHEVORSKI, ESQ. RUSTY GRAF, ESQ. BRIGID HIGGINS, ESQ. ERIC HONE, ESQ. BRODY WIGHT, ESQ. ALINA SHELL, ESQ. JARED KAHN, ESQ. JOSEPH GUTIERREZ, ESQ. TODD BICE, ESQ. DENNIS PRINCE, ESQ.

LAS VEGAS, NEVADA, FRIDAY, AUGUST 16, 2019, 9:17 A.M.

(Court was called to order)

THE COURT: Good morning. Are there any housekeeping matters before Mr. Shevorski begins his closing argument?

Mr. Shevorski, you're up.

MR. SHEVORSKI: Thank you, Your Honor.

It's typical in these scenarios to address the Court first, but I'd like this opportunity to thank your staff for putting up with for what a long, strange trip it's been. And I don't think could have happened without you. We're certainly from this side of the table and from that side of the table very grateful here, all of your help, and especially me, helping me find the binders over and over again.

THE COURT: Thank you, Mr. Shevorski. They are a great staff. Okay.

DEFENDANT STATE'S CLOSING ARGUMENT

MR. SHEVORSKI: Very good. Your Honor, when we first started chatting in May we talked about the adversarial process in the Attorney General's Office and how it was our goal to be fair to this side of the table and to this side of the table. I hope we've been true to our word. We have brought every witness that has been asked, without a subpoena. We've responded and provided 50,000, over 50,000 documents without a single request for production. It was our goal in

September of 2018 to be fair, to be honest, to be forthright. It is our goal in this hearing to be that way, as well. And I believe we've kept our word.

Addressing the merits, there are three constitutional claims outstanding still. I know Your Honor has ruled on summary judgment with respect to the property interests, but since Mr. Gentile, my friend Mr. Gentile has mentioned that as the outset, I'd like to briefly touch upon those.

Procedural due process. My friend Mr. Gentile is talking about an administrative problem. He is not talking about a constitutional one when he says that the Department went outside of its authority by crafting the regulations; that is an administrative problem. It might be some other reason for him openly on the merits to get relief, but it is not a constitutional problem. There is no liberty interest that it's affected that he has identified that could be the subject of remaining part of procedural due process. They were -- at the application -- this is not a permanent bar from ever entering into a profession, if you can think back to the United States Supreme Court precedent in Rah and others. There's no permanent bar here. There is no bar from the entirety of the profession. We're talking about a retail marijuana business and the hope for a license. That is not consistent with how the United States Supreme Court's defined

a liberty interest, nor is it consistent with the precedent in this state which mirrors our federal Constitution on that issue. And so the fundamental prerequisite for that claim is simply not here.

Secondly, there still remains substantive due process. Now, admittedly, that's an illusive term. But it's not without some definition. And when we talk about our substantive due process rights we're talking about rights that go back deeply rooted in ancient liberty. And the same jurisprudence has been applied recently in the Doe case by Justice Periguirre in 2017 where he ruled that there isn't a fundamental substantive due process right so deeply rooted in ancient liberty to even use medical marijuana. My friends on this side of the table have never explained -- if you don't have a right to even use -- a fundamental substantive due process right to use medical marijuana, how in the world can you have a right to sell it under substantive due process? The claim simply fails.

Finally, Your Honor, equal protection of the law. And the Malfitano case that we've talked about so often and our United States Supreme Court precedent cases, what we're looking at in these [unintelligible] cases is intentional discrimination against person, I'm singling you out for different treatment, without any rational basis. That did not -- that did not happen here. There's been no evidence in the

record for that. The Malfitano case controls, the federal precedence Gerhart-Lake Montana, 637 F.3d 1013 control. Equal protection under the law simply doesn't apply.

What we're talking about -- what we talked about in May when we first got here and what we're talking about now is an administrative law problem. It will never be a constitutional law problem, and it is not. And as an administrative law problem, Your Honor, that has a different starting point.

And now I'd like to get to the questions that you asked that I think my friends elided over yesterday, but didn't give you very good answers. When you first asked about did the Department of Taxation exceed the scope of its authority, the first thing we're talking about is authority from where. And my friend Mr. Gentile talked about the initiative, but he didn't talk about the jurisprudence that informs Your Honor's interpretation of an initiative and how that might be different from how you would approach a typical legislative act. Even though the voters when they approve an initiative are exercising legislative power, Your Honor's treatment of what they've done is slightly different.

And it's different in an important way here. It's different because you take a liberal approach to the interpretation of that initiative, and not in the political sense, but in the sense that you're trying to find what the

spirit of the initiative is and what the policy choice was before the voters and did the administrative body charged with implementing that policy choice -- was it faithful to the spirit. I submit, Your Honor, that the answer to that question is yes. And so the answer to the first question that you asked, did the Department act outside the scope of its authority, is no. Is no. Because you take a liberal approach to the initiative, a broad approach.

And we need to talk about -- when we're talking about acting outside the scope of the authority we need to know what authority the voters gave to the Department. And we talked about a few sections with my friends yesterday, but they skipped over what I believe is the most important section. And that's the section that you and I have talked about previously and we talked about for a pocket brief two months ago, 453D.200(1), excuse me. Within those two sentences are two grants of power. That's what they are. There was a grant of power to the Department. The first one is "adopt all regulations necessary or convenient to carry out the provisions of this chapter." That is not a limiting provision. That is a grant of power. "Necessary or convenient." Those are not limiting provisions. Those are broad provisions. That is a broad grant of power to implement the chapter. And when we talked about our pocket brief maybe a month or so ago there are many examples. Usually in the

Western states, where you had progressivism in the early part of the Twentieth Century that I know you know about, developing California. They amended their Constitution in 1911, and there you have the initiative power. And many states followed suit. And so you find these initiatives typically in the Western states. And one of them is Washington, which used its initiative power here. And they have a very similar provision, except they say "necessary or advisable," not "necessary or convenient."

And in the decision that I cited to Your Honor in the pocket brief what the Washington Court of Appeals -- and it's a published decision, but it is the Court of Appeals, not the highest court, and what they were talking about there to the determine whether or not the Department acted unlawfully is what is the spirit of this initiative and did the Department, the regulating body, comply with that spirit. And the answer was yes. I submit the answer is yes here, as well. Those governing principles, the broad grant of power is where we ought to start.

The second is another grant of power. But it's more -- I want to say more important, because it's for the protection of these folks. It's for the protection of these folks. "Regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably

impractical." And I can't think of a better example of how that would be so than what I heard from the general counsel of Mr. Kemp's client, MM Development, when he said, "Yeah, I suppose the Department and the State of Nevada could do that, run a background check every second on every transfer of a public share." But that would be tragic, because he was just talking about the fiscal externality of that. It would bankrupt the company. So in that subsection (1) what we have is a broad grant of power to keep in mind for the Department to not run these companies into the ground. The voters wanted practical solutions in keeping with the spirit of these initiative that did not run these folks into the ground. And so when we're talking about did the Department go outside the scope of its authority it's important definitionally to think about what that authority was. And in each instance when the voters put that in writing they gave a broad grant of power. A broad grant of power not only for the Department to do what's best in health and public safety and the health of the state, but also what's best in keeping with the spirit for these folks, to not run them into the ground and not make it unreasonably impractical.

So dealing with the particular sections I think Your Honor wants me to address, start with 453D.200(1)(b), "Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana

establishment." I submit to Your Honor that that section is ambiguous. The definition of "ambiguous" is -- are differing interpretations that are reasonable." I can't think of a better example to show ambiguity than when my friends on this side, particularly Serenity, brought in a sociolinguist to tell the Court what that meant. That is an admission that that section is ambiguous. Because if it takes an expert to explain it, it's ambiguous.

Moreover, Your Honor, the expert got it wrong in an important way, because she skipped over the part of the grant of power, but also she's misinterpreting the "shall include" language. That symbolizes a nonexhaustive list. A nonexhaustive list. It doesn't say that this is only going to be one of the regulations of the Department, it just says they shall include. Moreover, when you determine ambiguity you need to look at the entire chapter as a whole. And so when we cross-reference the competitive bidding statute at .210(6) there's no cross-reference back to qualifications. There's no limitation that says, hey, Department, if you're going to score applications you must only use qualifications directly and demonstrably related to operation of a marijuana -- it doesn't say that. If they wanted to, certainly they could. But they didn't.

So in looking at the chapter as a whole we have a broad grant of power, a nonexhaustive list, and so thinking

about the question you asked about diversity, does the Department have the power from the voters to include diversity in its competitive bidding process? Absolutely. Absolutely. You don't need to read "directly and demonstrably" to common to that conclusion, because the power is there anyways. It's a nonexhaustive list. And the only requirement from the voters on competitive bidding that it be numeric and impartial. Numeric and impartial. No other indication, no command from the voters to what to include.

But I submit to Your Honor, I submit to Your Honor because the phrase "directly and demonstrably" is not defined anywhere, because "operation" is not defined anywhere, and because the plaintiffs' own expert Mr. Seaborn got on the stand and agreed with us many different people can have a different interpretation of that section. That is what Mr. Seaborn said. We agree.

However, in the administrative law world, where many people can agree or disagree, we get deference. The Department of Taxation gets great deference. And if people can have an equally rational solution and think that that's okay, well, that's fine, that's what we debate about. But in the courtroom our interpretation controls over an ambiguous provision that we're charged with interpreting. We came to a reasonable, rational solution and said that diversity is directly and demonstrably related to the operation of a

marijuana establishment. And I submit that an important plaintiff agrees. You need look no further than if you went today on Nevada Wellness Center's Website and looked at their advisory board, they would be informing the Court how important diversity is to their operation. And "operation" is not defined by the voters. But we can think of a definition, can we? Human resources. Very important diversity, because inherent diversity, people have shared experience. It's not irrational to think that that shared experience is important to human resources. It's not irrational to think that the shared experience of the end user of these products with the board members or the advisory board members is important. It's so important that if you went on Nevada Wellness Center's Website today, you would see it, how they trumpet diversity, we share your experience, your inherent experience. So not only is that, you know -- if that section is ambiguous, we get the deference. We are within our authority.

But I submit to you, Your Honor, even if it wasn't, diversity is directly and demonstrably related to the operation of a marijuana establishment. And I submit it's an important one. It's the important one. It should be respected.

With respect to the address, now, when I was thinking last night what an important section that my friends overlook is right above 453D.200(1)(b). It's (1)(a). And in

that section is plenary power to the Department of Taxation to establish "Procedures for the issuance, suspension, and revocation of a license of a marijuana establishment." That plenary power certainly includes the power to create conditional licensure, which is precisely what they did. That is a broad grant of power. And so if you don't read subsection .210(5) in isolation, which is what my friends want to do, you see in (5) of .210 there is no definition of "approve." It doesn't say when it's to be approved. And because we have the power to have conditional licensure granted to us by the voters, we certainly have the power to say, you don't have to include an address. You could, you can. If you have -- if you're the owner, if you have the written permission of the applicant, you can. But it's not required. It certainly isn't compelled by the initiative.

And importantly, Your Honor, this all goes back to what were the facts on the grounds that the voters knew when this was being enacted? My friends operate here in the Southern part of the state. But this -- the State's concerned statewide. Mr. Terry got on the stand and explained the situation in the rurals. According to Mr. Terry's unrebutted testimony, it would be impossible to get an address in the rural counties where there's a moratorium. And so when we're creating a application with that reality, it makes no sense to require an address where it would be impossible.

And also, Your Honor, if we talk -- there was some talk about gamesmanship. And, as you know, [unintelligible], we don't play that game. But I will say that if we're talking about physical addresses, no one put before Your Honor, whether it be Mr. Thomas, no one put before Your Honor -- or Mr. Scolari, even, a binding lease. What they -- what Mr. Scolari testified to is those were nonbinding, there was no obligation on either side. And so, yes, they did -- there was some effort there. But was that -- did they have the written permission of the property? No. Because there's no -- there's nothing to bind the property owner, Mr. Scolari said. That property owner could have walked and said no. Could have said no. And so the address there really is fool's gold. There's nothing to bind them there. They could have moved it, the next property owner could have said no. More importantly, they can move the address. There's nothing that my friends have shown where it would be unlawful in the initiative to move the address. They just have to get approval from us.

And so when you take into consideration the fact that we have plenary power to create the conditional licensure it's certainly not outside our power to not have people submit a property address.

But addressing the community impact part, the community doesn't mean physical address. It's a broader term. It doesn't appear in the initiative. It appears in our

application. But it's a broader term. It doesn't mean the 4,000 square feet on the corner. There's no -- and this is our interpretation of it. It's from -- it's our interpretation of our own regulations. We get great deference for that. And think again, Your Honor. We are not operating where these fellows talking about, you know, the very expensive 20 miles away from the Strip. We're talking about the entire state. You don't need a physical address to know about the community impact if you're talking about a negative impact, even. You know, homogenous county, one of the rurals perhaps. But community impact is broader. It's not just the facility location. What are going to do for the community? That is included in there, as well. How is this new stakeholder in the community going to interact with them? That's part of what we're interested in. It's not the address. It's not synonymous with location. It's much broader. And so for my friends to say that somehow we didn't comply with our own regulations because the property address there -- wasn't there, because then you can't score community -- that is just wrong, because they're defining the term too narrowly, too narrowly. And if there's a dispute between the plaintiffs and the Department about the meaning of that term, we get great deference. And I submit that we did not abuse our discretion there.

With respect to the building plans, again, this is a

statewide project, a statewide roll-out. There were going to be people or entities applying for licensure throughout this state in counties where the local zoning boards did not approve. Mr. Terry got on the stand. His testimony is unrebutted. It would have been impossible, impossible. That does not mean that we can't score a building plan or a floor plan. That doesn't mean that we can't score that. We can look at the plan and come to a determination as to adequacy. As Ms. Cronkhite explained, as to the flow, dare I say even the risk of Norovirus.

THE COURT: Norovirus.

MR. SHEVORSKI: Norovirus. I apologize, Your Honor.

THE COURT: If we're going to talk about epidemiology, we have to use the right words.

MR. SHEVORSKI: Fair enough, Your Honor. I'm not going to talk about it anymore.

THE COURT: Okay.

MR. SHEVORSKI: But you don't need -- there's no -- there's no indication that you need a property address to thoughtfully consider the prospective proposed marijuana establishment, because it's not just -- certainly you could consider that it might be relevant to know the property address, but it's not necessary certainly in a statewide project where you couldn't even get a building, as Mr. Terry said, because it was unlawful. And we were certainly -- we

did not act outside of our authority, we did not abuse our discretion when we did not require a property address, because it simply was not necessary. And if there are disputes about whether it was a good system or a bad system or you could have had a better system, that is not what we're here for. What we're here for is an abuse of discretion. And my friend Mr. Bice is going to talk about possibly why what the plaintiffs are here for is not consistent with the preliminary injunction standard. And we've agreed that Mr. Bice is going to handle that part of the argument.

THE COURT: Because he loves writs.

MR. SHEVORSKI: He does. He does. So I won't touch on that any further. To put a button it, you do not need a property address, especially for the statewide project where it was illegal at the time to even enter into a lease. Mr. Terry said no one would do it.

Finally, Your Honor, the relief requested. We don't care who ends up with these licenses. It's not our -- we are here to show Your Honor that we did our level best, acted fairly, and we'll accept Your Honor's decision whatever it is. But I submit to you the relief they're requesting has very little to do with typical preliminary injunction practice.

And I will -- I want to end by talking about the background check and how that's related. We talked about ambiguous. And Your Honor asked about cure, I submit to you

that the background check provision is ambiguous. The word "prospective" is in there. When is that to occur? The voters gave no indication of that. Your Honor asked about cure. If Your Honor would have called out and said, everyone needs to do a background check, there is a possibility to cure that, because it says right in the statute "prospective." My friends like to concentrate on the word "each." But the word "prospective" is in there. And they provide no definition of it. And they certainly don't explain how the failure to do a background check at that time, in September of 2018 up until December of 2018, harmed them in any way or certainly threatened them with irreparable harm. If that provision -- if Your Honor's holding was that has to be -- the literal word of that, every second day there has to be a background check on public companies, we will do our level best to comply with it, if it's possible. My friends from this side of the table one after another said it was impossible.

And so what I would encourage Your Honor to do is to go back to 453D.200(1) and interpret that provision to say that the 5 percent rule is a rational, reasonable interpretation. I understand, Your Honor.

THE COURT: Okay.

MR. SHEVORSKI: But I'd like to take two seconds to try to convince you otherwise. Because that provision in 453D.200(1) tells us to be conscious not to regulate these

people into the ground. And I submit that what we did there by creating the 5 percent provision is consistent with that goal, is consistent with the spirit of the initiative and consistent also with -- again, the general I believe of MM Development testified that there is no threat to public safety if you don't background check a person who owns one share of a publicly traded company.

Finally, the 5 percent rule. That is not taken out of thin air. It's a reasonable compromise, no different than the compromise made by -- in the gaming world where they have 5 percent rules or 10 percent. It represents a reasonable compromise where the State, who's charged with regulating particular industries, tries to balance competing concerns and comes up with a number. Is there such a thing as a perfect number? No. But it represents a reasonable compromise, and it's within our power to find that compromise. And I submit that that's what we did. It's no more picked out of thin air than when Mr. Miller was talking about SARS in the currently regulates with the $5,000 rule. Could they have picked a different number? Sure. But no one's calling that $5,000 rule as somehow that's an abuse of discretion. It represents a reasonable compromise.

Your Honor, I believe that we did -- we acted within the scope of our authority. I believe we crafted reasonable regulations that were consistent with the spirit and the

intent of the voters. I would ask that Your Honor deny the preliminary injunction.

THE COURT: Before you sit down I would ask you to specifically address the incomplete information available to some applicants related to two issues. Some were told that diversity would be a tiebreaker, and the information related to requirement of a physical location because of communications by various employees of the Department of Taxation with other people.

MR. SHEVORSKI: Certainly, Your Honor.

With respect to -- I'll take the first issue that you talked about first.

THE COURT: Well, it's generally one issue.

MR. SHEVORSKI: Generally one --

THE COURT: It's the incomplete information to some but not others.

MR. SHEVORSKI: Incomplete information. Right. So the tiebreaker issue. Number one is I would say it's actually true, diversity is a tiebreaker if people have the same score. It's in the regulation. However, my friends never tell you when they heard that information. We're here on a preliminary injunction. They don't say that that was -- that diversity -- they were told diversity was a tiebreaker prior to the application --

THE COURT: I had your own employees testify to

that.

MR. SHEVORSKI: Not prior. It was --

THE COURT: They said that was what they were told it was going to be.

MR. SHEVORSKI: But it is a tiebreaker, Your Honor. In the case where competing applications have the same score it is a tiebreaker. However, also, Your Honor, what we're here on in the preliminary injunction world is what is the harm, how were they harmed by being told that information. No one has testified and provided concrete evidence to Your Honor that that harmed them in any way.

Now, certainly it would be unfortunate, but there is no reliance, there's no injury from hearing that information. So if that was true, and I'll accept that it was true, in this instance where is the harm for the purposes of this hearing to show that there is going -- that preliminary injunction needs to be in place for the duration until the trial on the merits based upon that information? My friends haven't even attempted to argue that to Your Honor or show that to Your Honor with any concrete evidence.

With respect to the address, there is a legal remedy for that. A legal remedy. If you believe that the State of Nevada misled you and you spent money based upon being misled, you have two options, submit an administrative claim and say, hey, you lied to me, I spent this money, I want it back, I --

THE COURT: Subject to the statutory cap.

MR. SHEVORSKI: Subject to the statutory cap. But no one has testified that that statutory cap would even pierced in this instance. No one's put forward that evidence to Your Honor now. You might infer that it's higher.

THE COURT: You and I know the statutory cap is, what, 50 grand?

MR. SHEVORSKI: It's a hundred, Your Honor.

THE COURT: Hundred. Okay.

MR. SHEVORSKI: I asked about it.

THE COURT: And you've got to go through the Board of Examiners to get it, so --

MR. SHEVORSKI: After -- over a hundred you do, below a hundred you do not.

THE COURT: Okay.

MR. SHEVORSKI: However, there is a legal remedy. You may -- and no one has said it's inadequate. What they have attempted to do is bootstrap that into this proceeding when we're talking -- what we're only concerned with is is there going to be imminent harm that if you don't stop the train during the pendency of this litigation I am going to suffer imminent harm. No one has said that related to that. No one has said -- no one has provided concrete evidence that being told that a property address was required caused -- is going to cause them imminent harm. If anything, Your Honor,

that's a claim for damages if there's a legal remedy if that was true. There's a legal remedy for that, and it would not be the basis for a preliminary injunction.

However, I would also say, Your Honor, is after we produced the ListServ no one has gotten on the stand and said that, that information didn't go to my company. They said, it didn't go to me, Mr. Hawkins, for example. But he identified his email address, his company's email address in the ListServ at 2021. And if you went to their Website right now, you would see that email address. No one has said that, it didn't go to my company. Even Mr. Thomas when he was on the stand said he didn't check the Website, he didn't know if his company got it. He knows that he didn't get it, but not that his company -- and this is someone who's extraordinarily sophisticated, extraordinarily sophisticated, and he was not willing to say that his company didn't get it, some person in his company didn't get it or it wasn't available, they couldn't have found it on the Website. What he said was he didn't know if they had.

So I would submit to you there's no concrete evidence at this stage -- it's not appropriate for a preliminary injunction anyways, but there's concrete evidence that anyone was somehow misled by 5 and 5A. Thank you, Your Honor.

THE COURT: Thank you, Mr. Shevorski.

Mr. Bice.

INTERVENOR DEFENDANT ESSENCE'S CLOSING ARGUMENT

MR. BICE: Thank you, Your Honor.

Your Honor, I am positive that during rebuttal I will be criticized as being one of the newcomers to the case and so that everything I say should just be disregarded. But I would point out to the Court that when they do that that's the typical response when you can't respond to the message so you criticize the speaker.

We're going to split this up as best we can amongst the defense team over here, Your Honor, and I appreciate the Court.

THE COURT: Just remember I've got to get Mr. Koch to trial by 1:00 o'clock.

MR. BICE: Yes. He's actually coming right after me, Your Honor. I'm not going to be that long.

So when I sat here yesterday, Your Honor, I was very interested, because I heard a closing argument on a trial on the merits. I did not hear a preliminary injunction hearing. I didn't even here really a discussion about the preliminary injunction standard. When I started hearing this --

THE COURT: You know I know what that is, though.

MR. BICE: Oh, absolutely. You're not -- but you're not the problem here. You're making the decision, but, Your Honor, this is a preliminary injunction hearing. This matter

has been coordinated in front of Her Honor on a preliminary --

THE COURT: Only on the preliminary injunction hearings.

MR. BICE: Exactly. So this is not a writ proceeding, this is not a mandamus proceeding --

THE COURT: Not yet.

MR. BICE: Right. But it's not a mandamus or prohibition proceeding challenging governmental action. This is a motion for preliminary injunction. You know what preliminary injunction is. But I'm going to focus on one aspect of it that really -- it is designed to halt a particular type of harm that the law says that plaintiff is entitled to be protected against until a trial on the merits can occur. That's all it's about. That's the sole scope of it, and that is as a matter of law what a preliminary injunction is all about.

So the question is a straightforward one. What is going to happen during that window, from today until a trial on the merits what is going to happen that this -- that you have a legally protectable right to be protected against, okay? Because that's the only thing a preliminary injunction is about, that window and what is irreparably going to harm you that you are entitled to be protected against.

When you listen to the plaintiffs they don't identify anything. Their injury here, Your Honor, supposedly

their injury is, we didn't get a license. Their injury isn't that the defendants got a license. That's not their injury. Their injury is, well, we didn't get a license. The preliminary injunction isn't going to give them a license. A preliminary injunction, the injunction that they are seeking is to halt my clients and the rest of these successful applicants from using the licenses that they were awarded. That's not an injury to the plaintiffs. The plaintiffs' theory here, Your Honor, is the most cynical, and that is, if I can't have it, no one could have it. That's not a preliminary injunction. That's not a proper exercise of judicial power to simply say, because I can't have something, you can't have it, either. They have identified no -- is a preliminary injunction going to award them revenues? No. Is it going to award them anything? No.

Now, in reading the transcript what I saw was repeatedly an assertion that the theory of harm that supposedly will be protected by a preliminary injunction is what they -- this vague reference to market share. But I noticed yesterday I don't think that word was uttered once. And I don't think it was an accident, because, as we and the other defendants have pointed out in our closing briefing, Your Honor, the law is clear on that. That is not a legally protectable interest upon which you may obtain injunctive relief, market share. These regulations that the State is

applying are about protecting the public health and welfare. They're not about protecting the market share of applicants. I cannot come to you and say, you know, Your Honor, I think that the State Bar of Nevada has gotten very lax in who it gives law licenses to so I want you to enjoin all future law license applicants until we have a trial on the merits about the State's laxness in terms of licensing.

THE COURT: So you don't like the bar passage rate being lowered, huh?

MR. BICE: Exactly. Right. That's eroding my market share. Every business could come to the Court and say, any new competitor erodes my market share. That is not a legally protectable interest, by the way, and it certainly isn't entitlement to a preliminary injunction. And that is what we have pointed out, Your Honor. You know, I characterize it, Your Honor, as standing, because this is why it is standing. I don't dispute that they have standing for certain types of claims here. I heard actually an argument about standing yesterday that it's actually meritorious on standing. That was from Mr. Kemp. When Mr. Kemp says he had the dispute about scoring -- now, others are going to address that and point out that he's wrong on that, but a dispute about scoring is standing for writ relief. If you actually wanted to seek mandamus, that would be -- you would actually have legal standing.

THE COURT: So let me ask you the question, given that admission.

MR. BICE: Yes.

THE COURT: Since there are a limited number of licenses available --

MR. BICE: Yes.

THE COURT: -- if Mr. Kemp was successful on his math error issue --

MR. BICE: Yep.

THE COURT: -- there would be no available licenses unless an injunction was previously issued to allow those licenses to be held in abeyance pending determination of that.

MR. BICE: No.

THE COURT: Tell me why.

MR. BICE: That's not accurate. And here's why. Because if he proved to be right on that, the State would then have to take action to solve that problem. It would either have to go in and say, okay, it turned out we were wrong, the score was lower than the lowest score appropriate -- which, by the way, is what happened in the NuLeaf case, which I'm going to talk about here -- and so therefore that license has to be taken from them. And that was --

THE COURT: But they weren't open yet on the NuLeaf case, because they were still having issues with the zoning and approval --

MR. BICE: That's right.

THE COURT: -- by the Commissions and the City Councils.

MR. BICE: That's right. But Mr. Ferrario's client did actually open and then did have to -- and lost his license on the appeal to the Supreme Court. So the State can -- the State will have to address that. Or, if the Court rules that the State has to give them a license, the State will have to solve that problem if they could win at a proceeding on the merits. We're not here -- that's not where we're at. We're here on a motion for preliminary injunction where the question is what is going to happen between now and a trial on the merits that you will be irreparably harmed. That's not what is before -- that is not what they are arguing.

So they're asking you -- they're saying -- you know, when people file a lawsuit against the State, for example, and say, they deprived me of due process --

THE COURT: You've never done that.

MR. BICE: I've done that many times. But what happens is you're adjudicating --

THE COURT: That was sarcasm, Mr. Bice.

MR. BICE: Right. You're adjudicating my rights, I was deprived. If I believed that I was improperly denied access to a university, either on racial discrimination grounds or public university on racial discrimination grounds

or something else, and there's a limited number of slots, I don't get to go in to the court and say, enjoin all admissions to the university until I get an adjudication.

Let's just deal with Mr. Kemp, right. He's got one license, apparently, where he says he quarrels with the scoring. He wants to enjoin 61 licenses. My client scored first. He wants to enjoin 61 licenses on that theory. That, Your Honor, is not a preliminary injunction, that is an -- that is basically an adjudication on the merits, and it's not about protecting him against irreparable harm. It actually is just about harming his competitors and using the legal process to do that.

So let me turn, Your Honor, to -- you know, we cite the caselaw to you. And this is why, Your Honor, I characterize it as standing, because standing, as the U.S. Supreme Court has said, is -- it's claim specific and it is relief specific. So you have to have standing for the claim, and you have to have standing for each form of relief you're seeking. And that's the Daimler-Chrysler case, you remember, at 547 US 332. They do not have standing -- and that's why in our brief I've characterized it this way -- to enjoin the government from honoring licenses to third parties. McDonald's might not like the building across the street run by Burger King and they might think that the government isn't enforcing the health care -- the sanitary laws sufficiently

against Burger King, but they can't go in and get an injunction against the government that says, don't allow them to open because it's going to eat into my market share. Those laws are not about protecting your market share.

The fire marshal case that we gave you where the fireworks makers got an injunction against the fire marshal because he supposedly wasn't applying the laws stringent enough against others, and the court granted him an injunction saying -- enjoining the fire marshal from issuing certificates to other people. And the court said that's error, those laws are not about protecting your market share, you don't get to do that and particularly on a preliminary injunction.

What is going to happen between now and a trial, Your Honor, that this injunction is going to protect them against that is irreparable? Nothing. All it's going to do is harm my clients and harm the public and keep the black market in play, because now there won't be as many people out there satisfying the public's desire for this product. That's all that this is about, if I can't have it, you can't have it.

But I don't deny, I do not deny that an injunction -- if an injunction were appropriate in those circumstances it would be very valuable. Because you know what it does? It makes my client's license a hostage. And what's the value of a hostage? Ransom. That's the value of a hostage. And that's what this is about, enjoin the State, make their

license a hostage, and then we'll negotiate a ransom for the release of the hostages. That's -- you would be hard pressed to find a more improper grounds for injunctive relief, a claim in equity. And that's what this is really about, Your Honor.

This preliminary injunction that they've asked for is not going to stop any irreparable harm between now and a trial on the merits. And it is just cynical to say, well, if I can't have, they can't have it, either.

Your Honor has been extraordinarily patient. When I read this transcript it just reminds me, thank goodness I don't have that job and I how I would not be suited for that job, because this -- the Court has given the plaintiffs day after day after day for 18 days on a preliminary injunction to prove some sort of irreparable harm, which is the cornerstone of preliminary injunctive relief, irreparable harm, how you are going to be protected from that irreparable harm until the trial on the merits can occur. And despite all of that time and all of that passage of time they've presented nothing in that regard. All we ever -- all I can see from the transcript and all I ever heard about while I was in here was this word "market share." And market share is not an irreparable harm.

Now, Mr. Bult yesterday made an interesting argument. I thought it was interesting. He said, well, the irreparable harm -- because I think he's the only one that addressed it -- the irreparable harm is you heard that we need

an integrative license and if we don't get an integrative license we won't -- we may not survive, some people may not survive, okay. That was his argument. Is this preliminary injunction going to give them an integrative license? No. Between now and the trial on the merits will they get an integrative license? No. So the preliminary injunction, the relief they are asking for, there's no nexus to the injury that they claim they are suffering. And that's the problem with this motion. If you want to seek writ relief, a writ of prohibition, i.e., on the merits, that's what a writ of prohibition against state government is about. But a preliminary injunction, telling state government, please punish my competitor while I see whether or not I have a claim against the State, is not appropriate.

So then I want to just turn, Your Honor, briefly to the merits, because I do want to address NuLeaf, because it was one of my cases. And I think it's very important here, because some of the arguments I have seen and heard are just deja vu. And in that regard, Your Honor, I actually pulled out one of the briefs from NuLeaf yesterday and read it and had a good chuckle to myself; because what is the argument that was made in NuLeaf? NuLeaf had actually had a location, but it had been denied a special use permit. But the statute said, in order to apply you had to submit -- and this is the key word that everybody seized upon, in fact, here's one of

their brief where it's bold, highlighted, and underlined, this word --

THE COURT: Sounds like Mr. Ferrario to me.

MR. BICE: That was Mr. Shapiro. But Mr. Ferrario did the same thing, bold, highlighted, and underlined -- or italicsed and underlined. It says that they have to submit all these things in order to admit their application, and that included land use approval from the local jurisdiction, all building authorizations, or a letter from the City, okay. "All" means all. Just read it. "All" means all, black and white. And Judge Johnson said, yep, I agree with that, it's black and white, "all" means all. The Nevada Supreme Court said, no, it doesn't, because you have to read the statute entirety in its context.

And that's all the more important in a case like this where the State is being called upon for the first time to implement a new statutory scheme. That's where its -- that's where its discretion is at its apex. So when you look at NuLeaf and you recognize what's the Nevada Supreme Court pointing out there, there are -- yes, it says "all," but, you know what, there are other provisions of the statute that make that somewhat inapplicable or difficult to comply with, and the State has the discretion to solve those problems administratively and to figure out how to do it.

And that's the -- that's where I want to turn next

to, Your Honor, is the two points that you raised yesterday, the location issue and then just briefly on the issue about the background.

On the location issue, Your Honor, the State just told you, and I believe it was Mr. Terry, my recollection, this is a statewide system. There are many jurisdictions, it's not just the cow counties. Henderson is an example. The City of Henderson the State was allocating licenses to. The City of Henderson had a moratorium. You can't have an actual address in the city of Henderson. You can't have an actual address in some of these jurisdictions. How does the State solve that? Well, apparently, if the plaintiffs had their way, you'd have to have two different standards, one for places that wouldn't allow an address and one for places that would. And you know what, had the State done that, they'd be screaming from the mountaintops about how discriminatory that is and how outrageous that the State would engage in such a practice. But the State, to its credit, solves that problem in a very reasonable and appropriate fashion. Because it has the power to issue conditional licenses, you could apply, and then you have to show them that location and make sure it satisfies all the criteria. That's what the State is doing here. It's no different than what was going on in NuLeaf where NuLeaf had actually been denied a land use permit. The location that they picked, the City said no. But what did the

State say -- or the Nevada Supreme Court say, that's not disqualifying, because they can petition the State, they could go seek other locations, and that is -- there's nothing inappropriate about that. The same is true here today.

With respect to this background investigation issue, Your Honor, I just want to touch on that briefly for the following point. My client, it doesn't impact them. My client, the Essence folks, they were all fully vetted and background investigated. So even if the Court thought there was some problem with that, there's no grounds to enjoin the operation of Essence's license. They had their backgrounds investigated.

But let's deal again with "each." You know, they pound on the word "each." They say, each, each, each. "Each means all, "each" means every. The State recognizes, and you heard it from the witnesses, that is impossible to comply with. And I'm going to leave others to address that, Your Honor.

So in closing, Your Honor, I just -- on two additional points. On this issue about the location and on the issue of backgrounds, Your Honor, on any challenge that they are making to the regulations laches applies. This is exactly Miller versus Burke, Your Honor. That's exactly what this is. They sat back and applied and waited to see if they were successful, and only when they weren't successful did

they jump forward and say, haha, those regulations were invalid. That was the same thing that initiative opponents did in that case. They sat back, they waited, they let everybody spend money, and then only when they lost did they jump -- spring forward and say, aha, the initiative was invalid. And the Nevada Supreme Court said, too late, you had the ability to challenge that before all the time, money, and effort was spent by everybody else.

And the same should apply here. This is too late. If you wanted to complain about the location, you wanted to complain about diversity, you wanted to complain about this background investigation, all of which you knew about and applied under, you could have brought your challenge, you could have sought dec relief against those before everybody spent tons of money.

And then finally, Your Honor, no one's talking about this, but the balance of hardships. As I've already pointed out to you, this injunction is not about guarding any sort of irreparable harm to them in the interim period, but it will impose a gigantic hardship on my clients and all the other successful parties, as well as the public at large. Mr. Yemenidjian, Your Honor, testified uncontroverted, no one disputes it, because his background in finance and knowledge of this stuff cannot be challenged, that just in the Southern Nevada locations they will lose $2.8 million per year per

license. Just on those five licenses in Southern Nevada, Your Honor. If the injunction were to last 16 or 18 months, a year and a half, they will be out over $20 million. And that's just on the profit end. That doesn't include all the time, money, and effort that they've already spent. That -- again, they are harmed, the public is harmed. The injunction -- such an injunction would frustrate them, frustrate the public, and it's not an injunction that would diminish the harm to the plaintiffs. All it would do is reward the plaintiff by saying, if I can't have it, no one should have it. And that's not the basis for injunctive relief. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Koch.

INTERVENOR DEFENDANT NOR'S CLOSING ARGUMENT

MR. KOCH: Thank you, Your Honor. You know, we started this hearing May 24th, the day after school got out, and here we are, kids are back in school, here we are on the preliminary injunction hearing. Why have we been here so long? Well, I would submit to you the reason why is we're at a hearing in search of a legally cognizable grievance. Throughout this proceeding and in the complaint certain assertions were made, but at this hearing new things have come up. We made a list of over 60 items that the plaintiffs have raised, and I would say it's everything but the kitchen sink, but there is the hand sink listed on there. Even the hand

sink. It's right there. And so we've wandered from side to side. The plaintiffs say, well, the Department was partial, went out on dares with people, they had partiality. In the next breath they say, well, you were too impartial, you didn't supervise the people that were being somehow influence, they didn't supervise the Manpower people, they didn't go in and micromanage them, you should have had more oversight with the people that we were partial. So they're blamed for being partial, they're blamed for being impartial. And on virtually every side of this coin there are arguments being made both ways, because the plaintiffs on this side, we're all in the same boat. Everybody in this room, it might have been a few points, maybe we're just a few points over the line, maybe we're way down the list, but we can all agree everybody here wanted more licenses. But there weren't enough licenses to go around.

So the Department had to make a decision on how it was going to allocate those licenses, and it had to use a numerically scored and impartial system. That's really what were here for. Plaintiffs have challenged all sorts of problems with the imperfect system, with imperfect people applying that imperfect system. And I don't think as I sat here and listened to government employees that I thought, wow, these are perfect government employees who did everything right. In fact, there were times I thought we wavered and

though, man, there were a lot of problems going I'm hearing right now. But that's what the system allows for. It does not allow for the legislative, administrative body to be overseen and changed by an imperfect judicial system. There's no perfect system. They're doing the best that they can.

And really the ultimate aspect of this as was talked about, the estoppel and laches aspect of this, the Miller case really is right on point, as Mr. Bice indicated. A little analogy here. We're here in a Business Court case. The Serenity case is a business case, filed as a business case. If you look at the Business Court designations in those rules specifically carved out from business cases under EDCR 1.61(b)(1) it says, "The granting, denying, withholding of any government approvals, permits, licenses, variances, registrations, or findings of suitability are not Business Court cases." Yet here we are. Everybody's shown up, everybody's argued. We've spent literally millions, I'm assuming, in attorneys' fees. We've submitted briefs, we've called witnesses, we've made objections that all have been overruled, and here we are at the end of this making our arguments --

THE COURT: There were some that have been sustained.

MR. KOCH: There have been a few. There have been a few.

THE COURT: There's a list. Somebody's keeping a list of the sustained ones.

MR. KOCH: All right. So let's come to the end of this at some point. Maybe today, maybe next week the Judge makes her decision --

THE COURT: Not today.

MR. KOCH: -- and that decision is made and whichever party is unhappy with that decision comes back and says, oh, this wasn't a Business Court case, we should have never been there, let's go back to Department 8 where Mr. Kemp's case was filed, that's the first case filed, that's where we should have been, so let's throw out everything that we did here, all the money that was spent, all the time that was spent sitting here, all the witness that was had, let's pretend like that never happened, let's go back to square one. What would everybody say? Everybody would throw up their hands and say, no way, we're not doing that, we all agreed, we're all here, we all acquiesced in the process because we understood what we were doing. The same goes for all of the requirements and all of the issues that are being raised here.

And in particular I want to talk about the prospective owner and the 5 percent rule. You know, that 5 percent rule didn't just come out of nowhere. I know the Court has asked -- you know, Ms. Contine I thought did a fine job explaining why they had the 5 percent rule. It's not in

the initiative. That's for sure. It doesn't say 5 percent. One question that the Court asked Ms. Contine, why'd you impose your judgment over the judgment of the voters' that they in the initiative, fair question, but I think it's the wrong question. I think the question would be did the voters even contemplate a 5 percent, a 10 percent. any kind of a rule like that. And, as Mr. Hawkins said, probably most apropos was, I don't think the voters cared about that, they just wanted to be able to get marijuana. That's what they were thinking about, but the concern that's in there is public safety. And Ms. Contine explained why public safety is protected by that 5 percent rule. And the 5 percent rule did not just come out of nowhere. In fact, prior to this time the Task Force specifically talked about it at length. Mr. Ritter, representative of TGIG, Mr. Gentile's client, was on that Task Force, actually the one who proposed the 5 percent rule. After the Task Force it was adopted in regulations in 2018, January. Nobody complained about that rule then. In fact, what's most interesting is that many of the parties on this side of the room who did not get a license this go around are currently operating retail marijuana establishments, they're public companies, and they have not had background checks on those less than 5 percent owners. They have not submitted their shareholder list to have that 1 percent owner or that .1 percent owner background checked.

We've heard testimony that that would be impossible, beyond impracticable --

THE COURT: 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.

MR. KOCH: It is impossible in this sense. One, let me tell you the problem. The street name aspect.

THE COURT: Absolutely. Same thing as proxies.

MR. KOCH: Extremely difficult. When does that background check take place? Does it take place at the time of the application, does it take place a year down the road, have all these individual stockholders who are sitting here now with a license, happily operating, receiving retailed marijuana revenue and income, have they all had those background checks done? Instead what we're essentially proposing here is a two-tiered system. Those that are operating with an existing license don't have to have background checks on every single shareholder, and those that apply new, they would have to have such a system.

Now, what the plaintiffs are suggesting really is something that the legislature would have to take up. Mr. Gentile said, public companies could not operate in gaming

until 1967, I believe it is. Well, public companies are operating marijuana right now, and if the legislature or if the people wanted to prohibit public companies from operating in marijuana, they better say so, and they better say so expressly. But the argument that's being made is an implicit prohibition on public companies from operating in this space because whether or not it's impossible, and I would argue it is, it's certainly impracticable, unreasonably impracticable, because this is what the statute provides. So instead the Department adopted the 5 percent rule.

Now, 5 percent, Mr. Parker said, well, that's just pulled out of nowhere. 5 percent is a standard number. If we were talking about 6.4 percent or 7.9 percent, well, maybe that's an arbitrary random number, I don't know. But 5 percent was in the medical marijuana regs in 2014. It's not a new number. It was in the medical regs, and nobody's complained about it. And we haven't seen the Sinaloa cartel coming in and taking over medical marijuana. In fact, if the nightmare scenario that's been talked about were actually true, you would think that the existing operators who had a retail establishment, who were not being background checked below the 5 percent would see an influx of Canadian Mafia, Sinaloa cartel, the Armenian street gangs all coming and buying up these minority interests just so they can have a piece of this pie. But that's not what we're seeing.

And certainly to the extent the public safety is the concern there's been no indication, no evidence, no proof of that. But really what Mr. Parker, when he asked Ms. Contine, would it be okay if a felon bought 4 percent because he wouldn't be background checked; and she said, under the rules that would be allowed, that question is not about public safety, because there's no indication that that person's now going to come in and start causing public safety concerns. That's a question of punishment for that felon not being allowed to own stock in that entity. That's not what the initiative was about. It was not about felons being prohibited from ownership. It was about public safety.

So really when a literal interpretation of a statute would result in an absurd result, and we argue and explain this at great length in our pocket brief that was filed, we can't do that. And that's really what the arguments that are being made here. Prospective owner in particular is a major problem. We talked about prospective. "Prospective" means future, possible. It doesn't mean owner as of record date. The statute could have said, the owner as of November 1st, 2018. It could have said that. It didn't say that. It says "prospective owner." And there's some ambiguity there, certainly.

And so the applicants submitted their application, our company submitted application, backgrounds were checked at

that time. Since that I there have been many owners that have turned over. The Court suggests, well, maybe we could do it on one day of the year, we could pick a day, we'll do it on that day and that'll be fine. That's as arbitrary as anything. Because the remaining 364 days the bad guys come in and buy up the stock and sell it off before the next check date.

What this Department has done is reasonable under the circumstances. They've provided a 5 percent rule that everybody agreed to and everybody indicated they had no problem with. And when those 30 and $40 background checks are coming in and the company's have to pay that, the Department doesn't have that money, it is going to make it unreasonably impracticable or impossible to be able to conduct those in a way that allows those companies to continue to do business.

Now, public companies aren't prohibited from operating in alcohol or prohibited from operating in other ways. In alcohol in particular it said -- the statute said or the initiative said, you can be regulated similar the alcohol. And so for the rule that we have talked about, the 5 percent rule, which, by the way, applies in gaming, suitability checks, applies for the SEC, the 5 percent threshold is there. In the SEC in particular it's very apropos in the sense that that governs --

THE COURT: Well, but you guys are all Canadian

companies on Canadian exchanges, so the SEC doesn't really matter, does it?

MR. KOCH: We're not talking about the SEC rules being brought straight over. But is there a reasonable interpretation? The SEC over years of regulation said 5 percent, we're going to have some limitations on that. We're not saying the Canadian stock market is any better than U.S. stock market. All we're saying is 5 percent rule is a reasonable basis to decide whether that person has some control over the company. And that's really what the issue is.

Now, there's a couple of solutions here. If the Court really were concerned about this, the first solution is what the statute says itself. The statute does not say when that background check needs to be conducted. In NRS 453D.200(6) it simply states that they need to conduct a background check. As we sit here today we're still months away from the 12 month deadline, which is really, in our view, what the plaintiffs are trying -- where the plaintiffs are trying to get us to, the 12 month deadline to get an inspection. We're months away from that. The Department could still conduct background checks of every successful conditional license applicant. They could do it tomorrow, they could do it the next day, they could do it before you get your final inspection. That's a timing issue. The Court

could say, all right, my injunction is you've got to follow the statute, you've got to conduct a background check before you get your final license.

It could also decide, as the Court had indicated, you could theoretically run a background check on a company. That would be one solution. I don't know how exactly that happens, but it could be a solution. And if the Court is concerned that we've got to follow exactly what the voters wanted, this would comply with that, although it may not be as precise as a fingerprint background check. Or you could decide that the Department would have to conduct a background check of the owners at the time the application was submitted. I think you'd still have issues with that, but you could at least have a point in time at the time the application was submitted.

So all these reasons, there's no basis to have a preliminary injunction of the type that the plaintiffs want. The plaintiffs want to burn the whole system down because 5 percent is a bad rule so therefore don't give anybody any licenses. That's not the relief that we're looking for -- or they're looking for. That's not the relief that should be granted here.

Couple of other items I want to touch, and one is compliance. The Court has talked about -- or the parties have talked about compliance quite a bit, and indicated that, well,

we've got all these problems with compliance. They brought up this Exhibit 96. They keep talking about it over and over. And this is the email from Kara Cronkhite, interestingly, with the blacked-out names. We never got the answer to that. The reason the blacked-out names are there is because this document was obtained illegally. This is a document that plaintiffs got. No one has come forward and said, here's who's on this, here's how I got this. It's an internal Department document. Ms. Cronkhite said, that matter's being investigated right now. The plaintiffs [unintelligible] come forward with this illegal document said, oh, look at this, look at this. What does it actually say? They're misconstruing, misstating the document intentionally. It says that the three entities listed there, Henderson Organic Remedies, NOR, and Integral, it talks about a self-reporting [inaudible] that said there was an incident, they reported it, they took the necessary steps to fix it, and we're not going to conduct an investigation. Plaintiffs say, oh, they swept it under the rug obviously, without anybody who's corroborated their version of that story. In fact, the only person that wrote this email explained it clearly and clearly explained what happened. Self reporting took place. That's the epitome of compliance. You don't want compliance -- I guess compliance could be the person who wrote this email or brought this in could come forward and say, I conducted an illegal

act, here I am, I'm going to comply with the law now. But NOR went forward and said, we had a problem, we fixed it. That's what compliance is. It's not about perfect operation without a single problem. In fact, Mr. Hawkins said, I've never had a single deficiency. Ms. Cronkhite said, there's no operator without a deficiency. And while Mr. Hawkins may not be aware of it, he's not on the email, it sounded like, on the ListServ or anything else. If he were, somehow he'd be the only operator in the entire state of Nevada without a deficiency. He's never put a cardboard box down on the ground that violates the regulations on those things. Those all sorts of deficiencies that could be there.

So compliance is something that requires the parties working together with the Department to make sure that they're operating properly. And compliance is considered in the context of anyone who could get a license had to be in good standing. You could not have had your license suspended and get a new license. You're not going to be able to do that. And so the Department would take into act compliance in that context, are you fulfilling the regulations and requirements of the law.

THE COURT: So did they?

MR. KOCH: Absolutely.

THE COURT: How? I haven't had any evidence that the Department considered compliance as part of the

application process, Mr. Koch.

MR. KOCH: A party that was not in good standing -- they didn't need to score it. That's a complete insinuation. We didn't get a score based on how many deficiencies you have. That's not what the statute says. It said compliance would be considered. I don't have the exact language. But a party in good standing could get a license. A party not in good standing, and there's several of them that had been suspended at different points in time, would not get a license. You can't grant a license to a suspended licensee.

THE COURT: So that's how you think compliance was used as part of the application process?

MR. KOCH: It would be a factor in deciding whether an applicant would be successful. You could not --

THE COURT: What evidence in our record do you have that that's what the Department did?

MR. KOCH: I do not. And that testified that somebody said that somebody was denied a license because they were suspended. But a license -- I believe the parties had indicated you had to be in good standing in order to be able to receive to a license. And it was not part of the scoring system, did not need to be scored, did not need to be part of the rubric. It wasn't on there. And along the same lines, if they're looking about points, there's not a point total listed for compliance. Nobody complained about that. Nobody had

that issue that was raised.

THE COURT: Okay.

MR. KOCH: Lastly, poor Amanda Connor. Her name has been brought up. She's not appeared here to testify. Brought up many times, insinuations have been made, well, she was paid a lot of money, she must have used some of that money to exert some kind of influence. You know, we've all been paid a lot of money to be here. I don't think anyone is going to insinuate that we have been paid a lot therefore we must be --

THE COURT: Mr. Shevorski says he has not.

MR. KOCH: -- passing it along. Well --

THE COURT: You could look on Transparent Nevada and figure out what he gets paid to be here.

MR. KOCH: All right. All right. But the insinuation that someone's paid for services and therefore you must be bribing someone is frankly offensive. Ms. Connor's good at her job. She represented parties that got licenses, and represented parties that didn't. In fact, Mr. Ritter, who was on the Task Force, his company was represented by Ms. Connor, still didn't get a license. The insinuation that somehow that calling Jorge, asking for information from Jorge meant that all her clients got licenses, not factually true. If it were the case, you would expect all her clients to be at the top of the list, and Jorge would have been supervising all the scorers to make sure everybody got a license. Partiality,

impartiality breakdown there is quite clear. You can argue partiality, you can argue communication, all those sorts of things all you want, but the reality is there's no evidence that any influence or any change was made.

So in the end we can sit here and hyperanalyze this process, but there's been no showing of arbitrary actions by the Department, no showing of capriciousness. What they've showed is the Department didn't have perfect, God-like confidence in carrying out this process. We all understand that. There were problems. Any process that we look back on -- if my day-to-day operation was watched, if anybody sat there and watched me would say, wow, he's got problems, he's messing things up. But that's not the basis to enjoin an entire system from being -- moving forward in an industry such as this, especially where it's new. The Department is doing the best that it can, and we will have improvement in the future.

And to say -- last item. To say there's a fixed number of licenses that will never increase is a false statement. The statutes provide for the ability to look to determine if more licenses may be necessary in the future and can grant more licenses in the future. So we're not dealing with a finite number of resources for an indefinite period of time. Thank you.

THE COURT: Thank you, Mr. Koch.

Next? Mr. Prince.

INTERVENOR DEFENDANT THRIVE'S CLOSING ARGUMENT

MR. PRINCE: Your Honor, good morning. And for the record, Dennis Prince appearing -- making the argument on behalf of the Thrive defendants.

Your Honor, I think it's no question that this marijuana industry is likely the most -- second most heavily regulated industry in the state of Nevada except for gaming. And a diverse group of citizens of the state of Nevada voted to create a comprehensive legislative and regulatory framework for the sale of marijuana in the state of Nevada. And one of the things that it did do was empower the State, it gave the State incredible power in order to regulate this industry. And I think Mr. Shevorski touched upon it, but the enabling statute, which is 453D.200, the language of it is critical to your analysis in this case and why an injunction shouldn't issue. Because the Department, it says, "shall adopt all regulations necessary or even convenient." That breadth of power is widespread and sweeping, because the voters knew and clearly understood that they weren't creating a complete regulatory or legal framework for the operation of these licenses. They were going to leave that to the Department of Taxation. So they empowered the Department to come up with the actual framework itself.

And if you look at the additional language from

subpart (1) regarding "the regulations shall include," that language is critical, because that is the minimum requirements mandated by the voters, not an exhaustive list of all the criteria or the power that the State could have. It doesn't prohibit the State from adopting additional criteria that in its discretion and determination benefits the public and the welfare of this state in order to operate one of these licenses. So they were tasked with the obligation of creating regulations to carry out this ballot initiative. And one of the things they did was as part of the initiative as 453.200 is they've indicated that "qualifications for licensure which are directly and demonstrably related to the operation of a marijuana establishment," that was left exclusively to the Department to make that determination.

This Court must view that expansively, not narrowly. There is no prohibition anywhere that diversity should not be included, because a diverse group of Nevada citizens voted for this ballot initiative. So therefore when the Department started to make this determination of what qualifications it felt was important or even necessary to carry out this legislative and regulatory framework diversity was not only not prohibited, it was likely encouraged. We certainly live in a time where we've been a civil rights movement for probably hundreds of years, but certainly the last 50 years, and certain groups, whether it be females, racial minorities,

or religious backgrounds, they are fighting to have their voice heard and included. Where and under circumstance would the State be wrong to include diversity as part of its comprehensive regulation of this industry? And in fact Mr. Parker on behalf of Nevada Wellness, he says, yes, that does in fact go to qualifications. Mr. Peckman testified to that in other testimony demonstrating to that diversity went directly to qualifications of an applicant. So when you're considering whether or not the State exceeded its authority, it's clear that 453D.200 certainly gives this broad grant of authority to the State to adopt regulations which in fact promote the appropriate qualifications of all licensees based upon a diverse background. They gave the State 13 areas in which to implement regulation, one of which related to qualifications. But it wasn't a prohibition for adopting any additional criteria that it felt in its reasonable judgment to include. And in this situation diversity was included.

Now, going back -- because what this relates to was was the process fair in September of 2018. Were all applicants on a level playing field? And, more importantly, did they know that diversity was going to be part of the scoring system? Every one of these plaintiffs, every singular one, had a medical marijuana license. They're all existing licensees. And in 2017 the State of Nevada determined that diversity was a relevant factor for a medical marijuana

license. And looking at NRS 453A.328(10), they include diversity on the basis of race, ethnicity, or gender of the applicant or the persons who are proposed to be owners, officers, or board members. Those are criteria to use. In addition, the legislature gave the following to the Department number (11), "adopt any other criteria of merit that the Department determines to be relevant."

When you're construing these statutes I think you have to construe both -- and harmonize 453A with 453D.

THE COURT: Even when they're in conflict with the ballot question, Mr. Prince?

MR. PRINCE: You have to read them in a way that it creates harmony, not disharmony. If you can't in all practical ways construe them in a way that creates harmony so you can carry out the voter initiative, that is your mandate, as I understand it under Nevada law, and that is your mandate.

But the point is was the process unfair. The process doesn't have to be perfect. It doesn't even state you can't make mistakes along the way. They can't exceed their scope of authority or act arbitrary or capricious. That's why the analysis has to start with the expansiveness of the grant of authority to the State.

But, more importantly, in February of 2018, when the Department adopted NAC 453D.272, it informed everyone, including every one of these plaintiffs, that, among others

things, diversity of ownership, officers, or board members was going to be considered a criteria. And the important part of this language is -- of 453D.272 of the NAC is it talks about the Department's going to rank the application within what applicable locality for any applicants where -- which in a jurisdiction that limits the number of retail marijuana stores. And one of the factors is diversity. So everyone knew as of February 2018 that diversity was going to be considered as part of any additional application for a retail license in the state of Nevada. Everyone is charged with that knowledge. Whether they chose to give it any weight, whether they truly understood it, that's not the point. By February of 2018 the State has now taken charge of this and made diversity a factor to consider.

But then it goes one step further with the legislature -- excuse me, with the ballot initiative. If you go back to 453.200, the voters understood and knew and wanted the State to come up with a process and a procedure, a regulatory framework where you can operate -- have a dual-license operation, which is specifically contemplated, if you only could apply for one license in 2017, if you have an existing license, existing medical marijuana license. So they specifically contemplated a dual-license operation. That's how you harmonize the diversity component. This aspect of it has to be read in conjunction with 453A relating to diversity,

as well as the adoption of the regulation. But by certainly September of 2018 every one of these applicants was clearly aware that diversity was to be considered as part of the application process. Whether they thought it was going to be tiebreaker, whether they thought it was going to be a factor or be scored, that's up to the State to make that determination. That's within their regulatory and discretionary authority. It does not -- each applicant does not have to understand that. Their lack of knowledge does not take away the State's power or the ability to consider diversity for any reason.

And in addition to that there's not even agreement between the plaintiffs. Mr. Gentile stood up here and said it's breaking his heart to make this argument but diversity somehow is inconsistent with the ballot initiative and that is a basis to grant this preliminary injunction. Mr. Parker, on the other hand, stood up here and argued that, yes, diversity is directly and demonstrably relatable to the qualifications of an applicant. Even using the plaintiffs' arguments, at a minimum its ambiguous. If it's ambiguous, then you have the right to make the determination that, yes, it was reasonable and fair for the State to make that inclusion. And how are -- you what kind of message would it be for this Court or even the Nevada Department of Taxation, for that matter, and say, we are not going to consider, we're specifically not going to

consider diversity when considering an application for a retail license in the state of Nevada. A diverse group of Nevada citizens voted for this ballot initiative. Therefore, there can be no reasonable challenge that diversity should not have been included or that, more importantly, the State exceeded its authority in including diversity in this. And it makes it all -- it's all consistent with 453A, 453D when you're operating a dual-license operation.

Now I want to talk specific about --

THE COURT: How many more speakers do I have after Mr. Prince? Four?

MR. PRINCE: When Thrive was granted, as well as all the other intervening defendants, its six licenses on December 5th, 2018, it had a vested property right in those licenses. In addition, it already had a vested property right in the licenses that it already had, and was operating a retail marijuana dispensary. The Burgess case makes clear that once you became a license holder that now you have the right before you can have that license revoked to a hearing and a showing of good cause. And the State has adopted comprehensive regulation relating to the suspension and/or revocation of a license, which includes notice and an opportunity to be heard in a contested proceeding, which would then give rise to some potential claim for judicial review. We don't have that here. This unsuccessful applicants have no right to judicial review

as an unsuccessful applicant.

But, moreover, Thrive, in response to being awarded those licenses, it paid $120,000 in licensing fees to the State of Nevada and is now subject to all of the requirements for these six licenses, even though it can't use any of them currently, to the rules and regulations, including relating to discipline, suspension, or revocation.

Now, I'm showing you a slide that Thrive has now started to advertise that their 3500 West Sahara location is now open. You had previously granted a temporary restraining order precluding Thrive from opening that location or against the State from allowing it to start operation under the conditional license grant from December 5th, 2018. But what this demonstrates is even though that location was not on the application, that they've identified an applicant -- a location, they went through all the land use and zoning requirements, they complied with all of the State requirements and underwent a final inspection by the State, all within six months.

THE COURT: And transferred an existing license to that location.

MR. PRINCE: Absolutely. Which it had the absolute right to do.

THE COURT: I'm criticizing you, Mr. Prince. I'm must making the record clear that it was not a violation of

the TRO --

MR. PRINCE: Correct.

THE COURT: -- by doing that.

MR. PRINCE: Correct. And the only way that they were able to do that is they actually had to close their Commerce location and use the existing license in order to open at 3500 West Sahara. Mr. Kemp argued, interestingly, yesterday that they should -- that Thrive should have been enjoined from opening that location at all. Which that's a fascinating argument. Because Planet 13, in order to open their location by the Fashion Show Mall on in Industrial, they had to close their existing southwest store and transfer that license with the approval of the State. And I'm certain he doesn't want an injunction against him or his client, rather, from operating that location on Industrial.

But a's critical to this is this 12 month issue -- obligation imposed by the State from the time of the conditional license grant we have 12 months to be open and operational. As we sit here today, Judge, and this is part of the balance of harm, none of these applicants are able to likely meet that. Thrive has come forward with evidence on this record that it found a location, went through all the land use and zoning, and has spent more than a million dollars between the City of Las Vegas and the City of Reno to open a location, and has been unable to do so. Part of this record

is, for example, if Essence, for example, can't meet this 12 month requirement, it's going to lose favorable zoning in the City of Reno which is within 1500 feet of the Peppermill Casino. They're going to lose that valuable right. So when you're talking about balance of hardship, those are two things, among other things, that you can be considering, is the effect upon these intervening defendants, the lack of ability to become open and operational.

Mr. Bice talked about it, but as a license holder Thrive did not have to, nor did any of the other applicants have to have an identifiable location on its application. The NuLeaf decision makes clear that that's not a disqualifying fact for the State to refuse to issue you a license. But it allows an applicant like all -- and it is a level playing field. This applied to everyone, not just the intervening defendants and the successful applicants, it applied to even the plaintiffs. They would allow you to find a suitable location even after you submitted the application as long as you went through the land use and the zoning requirements and you got final approval by the State prior to the opening of your establishment.

But I want to go back to -- since we want to focus on what was the power given to the State through the ballot initiative. And if you look at 453D.210, this was -- everybody focuses on subpart (b) of -- the physical address

where the proposed marijuana establishment will operate --

THE COURT: Under section (5)?

MR. PRINCE: It is section (5), correct.

-- that the physical address where the proposed marijuana establishment will operate is owned by the applicant or the applicant has written permission from the property owner to operate the proposed marijuana establishment on that property. We focused so much on Clark County and the City of Las Vegas and Southern Nevada, but this is a statewide rule, as I'm certain that you're aware of. But, more importantly, the second largest -- just by way of example, the second largest city in the state of Nevada is Henderson. They have a moratorium. There is no way -- for example, when Thrive went to apply it couldn't have identified a location effectively to open and operate in Henderson, because there's moratorium. And we don't know when that will be lifted or what the rules or requirements for land use and zoning will be in the city Henderson, in the second largest city in the state of Nevada. So that virtually would have been an impossibility. But when you're reading 453D.210 you need to read section (5)(b) with (e), which says, "The locality," which is clearly ambiguous, "The locality in which the proposed marijuana establishment will be located does not affirm to the Department that the proposed marijuana establishment will be in violation of zoning or land use rules adopted by the locality." Those have

to read together, because that criteria is in the conjunctive, that's all of the criteria. And under NuLeaf that does not prohibit -- not having a specified location on the application does not prohibit the State from issuing the license on a conditional basis. But when you read 453D.210 as a whole and you read (b) in connection with (e), it demonstrates that land use and zoning is an important aspect, and that may not be resolved until after the conditional license grant, because you can't even go forward with land use or zoning until you have the license. You can't even secure property, whether by lease or even by ownership. Who would spend that type of money, make that type of commitment if you can't operate the establishment in a proposed location. And, as Mr. Pupo testified last week, they knew that this wasn't going to be a scoring item, so everybody in this regard was treated equally. No one gained any additional advantage, and no one was denied any due process, because everybody knew it. And the NuLeaf decision made clear that the State was not obligated and could not require a physical location to be considered as a disqualifying aspect for an applicant.

And we also heard from Mr. Terry. For example, the practical part of this, in other rural jurisdictions there's not only a moratorium, they haven't even considered the issue yet. So there's no way for him to identify -- or any applicant to identify in those smaller rural counties where a

proposed location could even go. So that'd be impossible to even meet that standard. And I'm certain that the voters were trying to focus on the entirety of the state of Nevada, including those rural counties, and wanted to make sure their needs were effectively served. And there's no way that ,if that is an absolutely requirement, a disqualifying aspect in the rural counties, therefore we can't be served, every applicant would be disqualified in a rural county. And that is the absurd result which your interpretation can't allow to occur.

Now, taking this a step further on location, the voters specifically contemplated and authorized the Department to come up with rules relating to transfers of location. 453D.200(j) -- or (5)(j) allows for procedures and requirements -- not only allows, requires procedures and requirements not only just to transfer a license, but to also enable a licensee to move the location of its establishment. That's exactly what Thrive had to do. But in order to do that they had to close a store, all to their ongoing harm and detriment, because now they're no longer able to make money. Part of the downtown needs of Las Vegas are no longer being served, where this location on Commerce and Charleston was located. So now other needs of Southern Nevada are not being met as a result of this proposed injunction by the plaintiffs. But certainly the voters contemplated a change of location in

2016, because it doesn't even prohibit when a location can change. So reading this as a whole, certainly location is not disqualifying factor for anyone.

And with respect to the balance of hardships, my client, Thrive through Mr. Peckman, has not only testified that they paid $120,000 for the licensing fees, but they've also incurred more than a million dollars to become open and operational not only in the city of Las Vegas, but also the city of Reno. They are currently on an agenda item in Reno. They've identified a location, they've been working with the State, and they're waiting for that to be approved so they can go forward with their pre-operational process. But, moreover, the effect of them also affects them everywhere else, because they can't open their Thrive location because now they don't have a license to operate Thrive. They're being prevented from earning money on the existing licenses.

There's also another harm, not just to the individual applicant like Thrive, but to the public. One of the requested forms of relief by Mr. Bult yesterday was you need to void all of these regulations, need to void this process. That's what they're advocating. The State is also and the public is going to be harmed by that. Number one, the State collected application fees for 462 applicants at $5,000 each. They've also received for 61 licenses a $20,000 licensing fee. They would have to return or be at risk of

returning more than $3 million.

Further, they're not collecting the taxes that the voters stipulated would be collected from operation of these retail-licensed operations. And fourth -- or third, the black market continues to go and to thrive is not part of a regulated industry, which is exactly what a diverse group of Nevada citizens wanted it enacted this ballot initiative.

So therefore the harm to Thrive, Essence, and all of the other applicants it's substantial and ongoing. Moreover, we heard testimony in the evidence that Mr. Ritter, the owner and/or purported operator but maybe an owner, a ghost owner or whatever you want to call him, of The Grove, he proposed to purchase Helping Hands at two locations. He came up with conservative projections that for two stores [unintelligible] the earnings would be more than $6 million, net of a $1.4, almost
$1.5 million management for example. That lends credibility by itself to Mr. Yemenidjian's testimony that conservatively under his estimate that they're losing $2.8 million per year per store. So the losses are substantial and ongoing, Your Honor. As part of your overall analysis you must consider the balance of hardships not only to these potentially enjoined defendants, but also to the public at large, because the public is the one also who's going to be enjoined throughout this process that their will will not be effectuated.

And then finally, Your Honor, I want to talk about what are the options that you've here today in terms of some type of relief. One is -- and Mr. -- and which we agree with as articulated by Mr. Shevorski and Mr. Bice, there is no legal basis for injunctive relief. These applicants aren't going to be any different position now or at the time of a trial or even after a trial, for that matter. So there's no legal basis for an injunction at all. And the standard is did the State exceed its authority and act in a way that's arbitrary and capricious. And that's not just simply, we made a mistake, we made an error somewhere. It rises to a high level. Using the judiciary as one example, the Nevada Supreme Court could make a determination that a District Court judge abused his -- was wrong, but did not constitute an abuse of discretion mandating a reversal or change of outcome And that standard is somewhat applicable here. But the three bases we're talk about it is, number one, diversity . There is no way that the State acted arbitrarily or capriciously in considering diversity as a factor. The legislature made a determination that diversity was important for medical licensing, the State adopted this criteria in February of 2018, and every applicant knew it.

And going to Mr. Bice's argument with respect to the Miller versus Berg case they could -- if that was a problem, you should have challenged it then. There's no evidence in

this record of any type of a challenge to the inclusion of diversity as part of the ranking process. And it would send a terrible message for our state to say that diversity would exceed the scope of authority for the State to consider as part of a licensure grant.

Second, location. We believe that NuLeaf enables the State and gives it -- and underscores its broad plenary authority and discretion to grant conditional licensure without a specified location on the application, because they uniquely understood that locations may change, you may not complete land use or zoning approval or financially you may just need to change location or downsize or something may change in the process. But as long as you comply with all of the land use and zoning requirements and meet all of the State's specifications and requirements prior to opening, they're going to give you ability to open and remove the conditional grant of authority. So location would similarly not be a basis for any type of injunctive relief.

The third area would be background. And I want to state for the record even if you used the standard from the ballot initiative, Thrive met that criteria. All --

THE COURT: Because they had all of their owners disclosed in their application.

MR. PRINCE: They did. Even when it's under 5 percent.

THE COURT: And I have testimony about that from various defendants. Have you done an analysis, Mr. Prince of how many of the defendants in intervention and other applicants complied with NRS 453D.200(6) even though the application didn't require it?

MR. PRINCE: No, I haven't.

THE COURT: Okay.

MR. PRINCE: I confirmed that on behalf of --

THE COURT: You only know from your people.

MR. PRINCE: On behalf of Thrive and Essence I did make that confirmation, and both plans complied with that. But I do believe that the 5 percent rule is reasonable. The genesis of it was the Governor's Task Force, of which Mr. Ritter, who is an operator with TGIG and under The Grove, wife's name. He participated in that with not only members of the State, members of the public, but members of industry. So it does have a rational basis and a reasonable basis to conclude that 5 percent would be a threshold.

But more important, Your Honor, you asked yesterday is the term "owners" ambiguous. I submit that it's broad enough to include even a corporate entity. The State can investigate a corporate entity, and if they feel that further investigation into these shareholders and the officers and directors of that corporate entity is needed, they can conduct that investigation It may be more extensive than an

individual, but certainly the State has that capacity and ability. Because, for example, nothing prohibits one day after the application that a public entity or any other corporation -- they can acquire a percentage interest in an applicant. So, therefore, we believe that owner under these regulations, as well as the ballot initiative is broad enough to include a corporate form of ownership, including potentially a publicly traded corporation. It would be up to the State.

If the Court is considering any form of injunctive relief, we want to offer you this alternative. We believe that the background check would be the only available or reasonably available alternative to any form of injunctive relief, and it could be fashioned in this manner. To the extent that the State did not conduct a background check for each applicant, or an owner of each applicant that they be enjoined from issuing a final licensure and allowing them to open until that background check is complete. That gives -- it's consistent with the grant of authority to the State, it's consistent with their regulatory authority and their plenary authority with respect to investigating and approving licensees without the judiciary controlling how it's done. But it would allow the State to go back --

THE COURT: Mr. Prince, let me stop you. That is an interesting modification to some of the relief being

requested, but how would the Department be able to do that for those applicants who did not disclose the owners who owned less than 5 percent?

MR. PRINCE: That would be up to the State to make that determination. Your injunction would require the State before they issue a license to do that, or go back and determine if all the --

THE COURT: They haven't checked to see if the applications were complete when they got them, Mr. Prince.

MR. PRINCE: But they can do that up until the time of the grant of the final licensure. And I think they always have that ability. For example, ownership structure could change the day after the applications were submitted.

THE COURT: Absolutely. And it did for several of these entities.

MR. PRINCE: For some it did. That's why I don't think the date of the application can be static. I think that you have to continue to look at issues up to and including the time of the final approval allowing the business to operate, because of that ability. That's just a static shot in time. It doesn't comport with reality, and doesn't even fit with the State's continuing obligations. For example, if an entity sold a 5 percent or greater share, then they would have to investigate that as part of the approval process, right. That would be mandated.

THE COURT: They do that as far as transfer of ownership process at this point.

MR. PRINCE: They would do that.

THE COURT: Well, they do.

MR. PRINCE: Right.

THE COURT: Apparently they're very backlogged, but they do eventually do it.

MR. PRINCE: In addition to that, if they have concerns about a person or an entity owning 5 percent or less, they have the discretionary ability and the power to investigate those in their reasonable decision making.

And interestingly enough, this is even more sensitive than gaming. Gaming only has a 10 percent threshold. And so you can't argue on one hand that the most heavily regulated industry our state, gaming, at 10 percent has no rational or reasonable basis, but somehow 5 is completely irrational.

THE COURT: But Gaming actually does investigations.

MR. PRINCE: Well --

THE COURT: They actually do applicant investigations, Mr. Prince. They don't get an application and say, oh, okay, I'm going to staple it together, give it a number, and then give it to the temporary employees who've been hired. It's a very different process in the gaming application world.

MR. PRINCE: I understand the process may be different, and I think the process is ongoing, and there's certainly going to be resources and could be dedicated even after a conditional license grant to investigate all of the people who are owners, board members, and/or officers of a successful applicant. There was 461 or -2 applicants.

THE COURT: 462.

MR. PRINCE: 462. That -- and 90-day window that would be require such an exhaustive use of manpower and labor it'd almost be impossible to do that. But, nevertheless, they have that obligation. The only question you're asking is were they required to list the owners and background check them.

THE COURT: That is what I am saying. Because there are some applicants who, even though they were not required to list those with ownership interests below 5 percent, did.

MR. PRINCE: Correct.

THE COURT: And complied with 453D -- hold on, I've got to switch screens -- 45D.200(6).

MR. PRINCE: Subsection (6).

THE COURT: And I'm just trying to figure out -- I had testimony, so I had bits and pieces, but I'm trying to figure out how many of all of those 462 applications complied because either they were being overly cautious or for some other reason.

MR. PRINCE: I think the issue for that would relate

to whether or not any of the 61 applications that were approved -- the only issue would be were any one of those winning applications, were they not fully background checked under that standard.

That's why I'm saying alternative injunctive relief -- if you're considering injunctive relief at all, could it reasonably -- should it relate to background checking and enjoin the State from allowing anyone to open or go forward with final license approval if they didn't either complete the application correctly or didn't have a complete background check. For my clients, both Thrive and Essence, they identified every owner, gave them authority to conduct a background check, and they complied with that obligation, because we listed that. Our clients should not be penalized because some other party may not have done that. I'm not trying -- respectfully to all of the other successful applicants, I don't know who this would apply to completely. I think I have an idea who may not -- may have a concern. But that's not my concern this moment. I'm trying to make certain that my clients can live within a framework of judicial relief that you could grant that would not prevent them from moving forward with their not only pre-opening operations and expenditure of money, which at this point has been in the millions of dollars, the loss of revenue has now been in the millions and is continuing to grow, but it also allows you

some judicial discretion on how to fashion an order.

But, moreover, I think with regard to -- I was talking to Mr. Pisanelli yesterday. Owner could include a corporation, even a publicly --

THE COURT: We had that discussion in the first couple of days of the proceeding, and you and Mr. Pisanelli and Mr. Bice missed that.

MR. PRINCE: Mr. Bice. I know we're new. I know. But nevertheless --

THE COURT: Well, we discussed that issue long ago, Mr. Prince, sometime in May.

MR. PRINCE: And the other issue we raised -- I'm done -- is with respect to compliance. Because you heard no evidence of how each applicant complied. I think, respectfully, Your Honor, that would be burden shifting. That should be up to the plaintiffs to come forward with there was compliance problems with one or more of the successful applicants. That's their showing at the time of a trial, not at the phase of a preliminary injunction. That would be a trial on the merits issue and certainly not something to be considered as part of a preliminary injunction proceeding.

And with that --

THE COURT: Thank you. Before you sit down, Mr. Prince, we need a copy of your PowerPoint so we can mark it as a Court exhibit.

MR. PRINCE: We will.

THE COURT: Thank you.

Dulce, if you would remind him.

Who's next? Mr. Kahn.

INTERVENOR DEFENDANT HELPING HANDS' CLOSING ARGUMENT

MR. KAHN: Good morning, Your Honor. Thank you for providing Helping Hands Wellness Center the opportunity through this whole proceeding and to present some closing arguments today.

Without belaboring the Court with repetitive arguments of what has already been presented, from our side we do join some of these -- we do join in the arguments from the State and what have been presented thus far from the intervenor defendants and what will continue to be presented.

However, I do want to address a couple points that I think are important for this Court to see what was presented in the record so there's a greater understanding for Your Honor if she were to issue an injunction or a modified injunction, and I can address that, as well.

The plaintiffs thus far through several weeks of full-day hearings have tried to paint the picture that there have been mistakes created by the State through implementing the statute, creating regulations, or -- and/or in implementing application process, or in its grading. In trying to muddy the water of this entire process what they

have done is try and create, well, let's throw in a whole bucketful of mistakes -- that we don't agree with, by the way, Your Honor -- to see if that rises to the level of arbitrary and capricious conduct, and then seeking relief that they described yesterday as multiple forms of relief, let's enjoin the process so final licenses can't be issued, let's void these licenses, let's void the regulations -- which would shutter the industry, by the way, Your Honor, so I don't know if they actually truly want that remedy -- or let's get more points because our application was scored incorrectly.

Well, the problem with that, Your Honor, is that many of these applicants are not taking and acknowledging the responsibility of the errors in their own applications. And I don't believe that that has been properly before you. The evidence is there, the record is there. I'm just going to show you a couple examples, Your Honor. And that's particular to Mr. Kemp's clients.

Mr. Kemp -- and you addressed this and I'm going to note this here. What if Mr. Kemp were successful in establishing that he should have had higher points? Do you enjoin the whole program if he pursues a writ, or do you just enjoin the next person above him? And that's what they tried to pursue in NuLeaf. In NuLeaf they didn't enjoin the whole program because of one complainant saying, I should have received more points to the person just right above me.

That's where MM Development stands. It would be an abuse of discretion, Your Honor, to say, I'm going to enjoin the whole program to allow MM Development and LivFree to come in and take one or maybe two licenses, the enjoin the rest of the 61 applicants. That would be throwing the baby out with the bath water, Your Honor.

But MM Development and LivFree still have to prove a likelihood of success on the merits to even reach that type of injunctive relief. And they have not established that. And the reason they haven't established that, Your Honor, is the grading process they didn't comply with. I'm going to point it out to you, and we're going to bring up exhibits in one second. The application was graded so there's an identified and a nonidentified. I'm speaking to the choir here. I know you understand. The graders -- there's testimony that the graders were separated. The identified graders did not see the nonidentified portions. So if you put a portion in your application in the identifying section that is supposed to be scored in the nonidentified section, that nonidentified grader has no knowledge you've provided that writeup.

And if we want to take a look at MM Development's application, which is Exhibit 20, and we're going to be looking at what was Bate stamped MM00009, here is a great writeup that Mr. Kemp has repeatedly expressed, was that they submitted that they were going to be able to open up their

former MediZine location, it's a built-out, approved location, clearly could be done within that 12 month period. They included this writeup in the identified section.

Now if we look at Exhibit 2012, which is the scoring sheet for the nonidentified section, where the building plans needs to go, it indicates in there that this is in the nonidentified section where you have to describe that your facility can be built within the 12 months.

So if we go back to M&M's application, Exhibit 20, on the nonidentified building provision, which is marked MM001031, this is their writeup in the nonidentified section -- oh. No. Excuse me. That's LivFree's.

While Brian is pulling it up, there's no description. I'll attest to that, Your Honor. The record does not -- does reflect that their application in the nonidentified building portion does not have that same description that was included in the identified. So when they complain that the grader failed to give them the scores on the nonidentifed, it was their own error, Your Honor. They failed to include that writeup therein. That grader never saw that information, and appropriately and correctly scored it.

Now, we're going into basically like a trial on the merits on that issue, Your Honor. But on a likelihood of success on a preliminary injunction I think they're going to have a hurdle and a burden that they can't achieve. Not only

that, why -- even if they were able to prove that it was done right, why enjoin all 61 applicants if only they're jumping up a couple points.

The next, Your Honor, is Mr. Kemp's client LivFree, okay. LivFree's application was Exhibit 20 -- excuse me, 21, and they complained that they submitted a plethora of documents regarding their finances and weren't provided the correct financial score. Your Honor, when you look at what's Bates 130 and 133, in it they notate themselves that Bilko Holdings is the account owned by LivFree's majority owner. Then on Bate stamp 132 is a financial statement and their bank statements that show it's Bilko Holdings' bank accounts. Now, that's fine and sufficient, Your Honor, except for the fact they didn't comply with the application's directive. The application Exhibit 5 on page 17 states that, if you are going to use the -- relying on the funds of an owner, that source has to unconditionally commit such founds to the use of the applicant. And they failed to include such a statement, attestation, letter to that effect. So they've relied on basically Bilko without saying, Bilko's funds in that account are unconditionally for the applicant.

Now, I'll attest to Your Honor, and my client's application was admitted to the record yesterday, and in that application we have unconditional letters of attestation that says, these board members, owners, and officers, each one

individually state our funds are going to be unconditionally used for the entity. They failed to do that here. And in fact I believe it was in the MM Development lawsuit even the declaration from the representative for LivFree who prepared the application says in her declaration failed to include the unconditional commitment of funds as part of the application.

So now we're talking about let's enjoin this entire process so that errors by the applicant can stop all of us from opening. And instead of them acknowledging their errors, they're saying, the State committed a scoring error and let's blame the State for our own mistakes. And, Your Honor, that would be an abuse of discretion to issue an injunction to that regard.

Now, again you inquired today, Your Honor, what would happen if Mr. Kemp was correct and maybe I'm wrong, maybe the documents somehow don't speak for themselves, and he's going to pursue a writ of mandamus for a scoring error. Again, his client would bump up maybe a couple points, maybe they'd get above the line, but that only, as the NuLeaf case explored, was they only pursued that immediate next person above the line. An injunction for everybody would be much too broad. They only sought the injunction against the NuLeaf entity.

Here what Mr. Kemp has argued for is, I want more points and I'm seeking the injunction and we're stopping the

whole process. And I don't believe that would be a viable option.

In dealing with an overly broad injunction, and you had Mr. Prince explore some of the issues on let's say the background checks, Your Honor. And I agree with you the background check in the statute and the regulation are clearly not identical. We support the State's ability to implement their own regulations and what they did to try and achieve what would work for the industry in setting a 5 percent benchmark. However, if you were to enjoin the program, my client complied. We had every owner, officer, and board member submit their background checks. So why should we be enjoined if some of the parties on this side of the table may not have conducted a background check on all their owners? So the narrowly tailored injunction to tell the State, look, go back and background check every owner, officer, and board member, come up with that relief before you issue these people a final license, fine. And if some of those parties can't comply, what is the remedy? Well, then they don't get their final license. That's the remedy of the State. They have a deadline to perform and obtain those final licenses by a certain date, December 5th of this year, and if those parties cannot achieve that mandate from the State to background check all their owners, well, then, unfortunately, they lose.

They would argue that the regulation is of course

necessary, reasonable, and within the bounds of the State's discretion. But if you were to enjoin the entire program because of that narrow provision, then we would attest that is a wrongful injunction at least against Helping Hands.

Now, we've kind of explored some of the balancing of the harms. There was presentation yesterday from the plaintiffs that there's no evidence that these defendants are going to be harmed, essentially, that there's no evidence in the record. Now, my client presented LOIs and term sheets of proposed offers they cannot pursue because of this injunction proceeding, and that's a potential financial loss to the tune of $12 million and $10.2 million for those licenses. But, interestingly, Mr. Bult says about his client -- some of his clients that are cultivators only, similar to Helping Hands Wellness Center, who only had cultivation and production licenses, no dispensaries, that his clients are irreparably harmed and the balancing of the harm is unfair to them because they can't have a dispensary and they're going to go out of business because the cultivator is not going to be able to succeed. Well, then that balancing of the harm test Mr. Bult proposes certainly applies to my client and why we are irreparably harmed under that analysis if we're not able to participate in the market. However, we are. We won licenses.

Your Honor, I want to address the compliance issue that has come up a couple times today. In NRS 453D.201, which

is a nonexhaustive list, evidence of compliance is not listed as one of the mandates for the State to consider. It's not there in any of those listed factors. Now, the State certainly could include a review of the compliance as part of what is directly and demonstrably related and within their discretion with their broad authority. But specifically it's not noted. And in then if you look at the regulations, the NACs, 453D.268(10), the only place compliance shows up there is when an applicant must provide a set of plans that shows how they're going to be compliant. They don't actually say, give us your compliance history.

So on one hand you have these plaintiffs who argue, ne need to have strict interpretation of the ballot initiative, we cannot falter or waver, we cannot include diversity, because it's not there, or some say we can't include it, we must have background checks, some of these plaintiffs who are public companies couldn't comply. All on them. Now they're saying, well, you should have included compliance. But if you look at the statute itself, a strict reading of it, it does not say compliance is required to be considered as part of the application.

So now are we going to read in new provisions? Because, if we are, are we reading in the new provisions for diversity? Are we altering the statute to adhere to what the State did with their board authority to say we're not going

include properties anymore? Once we take a 20/20 hindsight approach in saying what the State should have included, shouldn't have included, that would cause a Pandora's box of suggestions from third parties, and everybody will come up with new ideas of what they should have included or what they shouldn't have included in compliant. And it'll be endless.

Instead, that is exactly why we designate the authority to the State and their agency to implement the regulations for this industry. Because when this ballot initiative was passed in 2016 it was based on a ballot initiative written and submitted to the Legislative Council Bureau and the Secretary of State in April 2014. In April 2014, Your Honor -- and that's Exhibit 5042. In April 2014 the medical marijuana dispensaries were not even open yet. They had projected, this is what the regulations -- this is what the statute should look like in the future at some point. But that is before the industry had even had an attempt to have any operations. That's before the State had an attempt to even know how to control these folks in the industry. That ballot initiative back in 2014 could not contemplate public companies would be owners or stockholders in any of these companies, because none of these companies were even operational at the time.

So it doesn't matter that you just say, let's look at the voters' intent. But you have to look at the whole

picture. And that whole picture is what happened when that ballot initiative was written and submitted to the state in 2014 and nobody contemplated these issues. Nobody contemplated the property issues, but the State and County lawsuits that occurred, those were at the end of 2014 into 2015 when that initiative was there. Nobody contemplated NuLeaf's ruling. That's why it's a -- you have to see it as almost like a fluid document, which is why it directs the State to implement necessary regulations, which is what they did here in this case.

I'll close with that, Your Honor, unless you have any questions.

THE COURT: Thank you. And similar to the question I asked Mr. Prince, have you done an evaluation as to which of the successful applicants complied with NRS 453D.200(6) beyond your clients at the time of the application?

MR. KAHN: Your Honor, my understanding is that on our side of the table there are one or two public companies. I don't know if they have complied with that statutory initiative. However, there are many other intervenor defendants on our side of the table besides those two public companies who all have come in and have said, we have background checked all our owners, officers, and board members.

THE COURT: I remember hearing that testimony.

That's why I'm asking the question, so -- okay. Thank you.

MR. KAHN: Thank you, Your Honor.

THE COURT: Mr. Hone, Ms. Shell? Who's next?

MS. SHELL: I think Mr. Graf is next, Your Honor.

THE COURT: Mr. Graf.

INTERVENOR DEFENDANT CLEAR RIVER'S CLOSING ARGUMENT

MR. GRAF: Thank you, Your Honor.

Your Honor, I'd kind of like to start off by answering a couple of your questions.

Tiebreaker provision that you asked questions about is contained within the actual application. It's in subsection (6), Your Honor, after the discussion. And, Your Honor, so some of the questions that you've asked today are the questions about what sets each of us apart. To answer your other question, Your Honor, Clear River -- and, Your Honor, Rusty Graf on behalf of Clear River LLC. Most of the evidence and presentation of proof regarding Clear River has been presented through evidence of other people. Charts that were presented by the State as to the ownership. The ownership of Clear River LLC is two individuals, that neither one of them has less than 5 percent and both of those people were checked. And there's a certain amount of common sense that goes along with this background check, Your Honor, and there's a certain amount of common sense that goes along with this, because in the 18 months of which this application

period fell only those applicants that had previously been licensed could apply. So, Your Honor, if those entities were the same as Clear River is, those people have already been background checked. So that's one issue, Your Honor, in terms of Clear River.

The other issues that, you know, Clear River needs to bring to bear, Your Honor, is the fact that this isn't a perfect process. None of these very smart people, attorneys or the parties, got up and said, you know, we expect the State to be perfect, to throw a no-no. We didn't expect that, Your Honor. We didn't expect them to be perfect. We don't expect them during this process. There's going to be errors like Mr. Kemp's clients'. There are going to be those. But what I intend on presenting to you hopefully in about 10 or 15 minutes, Your Honor, is the fact that Clear River has none of those errors.

They talked about diversity and advisory boards, and we'll talk about that as we go through here.

One of the things that I wanted to address that was discussed yesterday was that the defendant intervenors chose to be here. Your Honor, we chose to be here like somebody walks out, sees somebody driving away with their car and they run after them so that they can get their car back. That's why we're here. We're here to protect the interests that we've got. Mr. Ritter, TGIG's representative, the Serenity

plaintiff here today, testified during his presentation that the licenses are worth ten to $12 million. Then we had to watch the excruciating and uncomfortable testimony of the cross-examination of the gentleman who came in here to testify about a document he got from Mr. Ritter that verified the very testimony of Mr. Ritter, that said, these are worth ten or $12 million, and, lo and behold, he presents an offer that says, I'll offer you $10 million for your license, I'll offer you $12 million for your license.

And Her Honor has asked questions throughout this process about, you know, what things were worth or if there was a market for these things and everything else. There's a couple of wrinkles I want to throw into Her Honor's discussion, and I don't think there's been any answers to these wrinkles. So NRS 453A.324(1)(a) provides in the medical marijuana purview that there's only to be 40 dispensaries in any county that has 700,000 or more people. That number was increased by the ballot initiative, Your Honor, that was approved by the people to 80 dispensaries.

THE COURT: For recreational.

MR. GRAF: For recreational. So there was going to be different licenses, there were going to be different dispensaries. There's going to be an increase. No expert on behalf of these plaintiffs discusses that. The only testimony that we've got is testimony from Mr. Hawkins and from several

other owners that this is going to hurt their market share. How? Forget the fact that it's mere speculation, that it's a statement by a corporate representative with no backup. There is no -- and Dr. Seaborn's the only one that testified to this, and Dr. Seaborn, what he said, and I went back and I read it yesterday and it was interesting, he said, it's kind of like economies of scale. And then I was like, well, I'm a finance major, I should know what that means. I didn't. So I went back and I looked it up. Economies of scale means that you decrease your unit price such that by having larger production. So as production increases, your unit price decreases. And I'm like, how does that affect their market share. It doesn't, Your Honor. And that's the problem with this whole case by these plaintiffs. That's the problem. The whole market was growing. Their market share was necessarily going to be decreased, and nobody, no expert on behalf of the plaintiffs, not Dr. Seaborn, not any of the testimony by any of the parties addresses that issue. Her Honor's got to guess. That's the definition of mere speculation. There's no irreparable harm. There's been no testimony, there's been no evidence to prove it, period.

Let's set aside the fact that Mr. Parker deferred to Mr. Bult when he was talking about the relief that they sought. Mr. Bult doesn't have an injunctive request in his complaint. Set that aside for now. That's probably for

dispositive motions down the road, okay. But in reviewing and getting ready for this argument I actually read the pleadings.

THE COURT: Really?

MR. GRAF: Go figure.

THE COURT: Me and you are probably the only two.

MR. GRAF: Probably.

THE COURT: Oh. Mr. Bice probably read them, too.

MR. GRAF: So then -- here's the reason why I did it, Your Honor. I got confused yesterday by Mr. Gentile's argument. Mr. Gentile's argument, he said at first -- I have to go to my notes, because I don't want to say it wrong -- that he wants an injunction enjoining the enforcement of the denial of their applications, is what it says in their complaint. And in fact on page 16 of their complaint it says, for a preliminary and permanent injunction enjoining the enforcement of the denial of their application. I was like, I don't know what that means. Fine. We're going to enjoin the denial of your applications, I don't care. I've said that several times in this case, Your Honor, and I mean it, okay.

The second thing is, Your Honor, then Mr. Gentile said something very curious. He said, I don't want this Court to issue an injunction that affects any of the intervenors' rights. And I was like, wait a second. We do have rights. We're the ones that got conditional licenses. If anybody's got a property right in this room, it's my client, who didn't

do a dang thing wrong in submitting how his applications were done by his daughter, and then they're trying to take those away.

So, Your Honor, I had a big presentation where I could go through a bunch of other information and everything else, but I really want to talk about a couple of things before I stop. And that is on the State's Website which has been produced as an exhibit whatever, I don't know what it is, they have that production that was done after May 10th. And I know Her Honor doesn't agree with our argument as to petition for judicial review, but I think it was important that what they argued during that opposition to petition for judicial review, they argued that the dispute is between them and the State. Okay. Then the people that did it right, that were awarded conditional licenses, they should keep them.

So in my trial brief what I tried to do, Your Honor, was I tried to say, besides the fact that I didn't delete the conclusion and it was about 10:30 at night; I apologize. So the issue becomes as to the petitions for judicial review and the fact that they don't want to disrupt anything that we've got, this is an equitable proceeding, Your Honor, and with equity you must do equity. And here what we're really talking about is the fact that -- and I vacillate back and forth, because, as Mr. Shevorski says in numerous occasions, I have friends on both sides of this, and my clients have friends on

both sides of this, and everybody in this room knows that it's a small community. Everybody knows everybody. Ms. Black is now the president of the NDA, I've got all kinds of things that I'm being told in different days about what we should argue and what we shouldn't argue and everything else. But here's the thing. Everybody in this room I think is for the proposition that this industry needs to be regulated, number one, and, number two, that it needs to be brought along in such a way that's cohesive and logical.

What these applications and what the allegations that are being made say is that, well, there's problems and you guys did this. Well, what I think may have happened when the case was started was all of the plaintiffs got together in a room, and for Serenity case it's Serenity, TGIG, NuLeaf, Nevada Holistic, Tryke, Fidelis, Gravitas, Pure, MediPharm -- we talked about MediPharm before, but I'll leave that for another day, also -- all of those people got together and they said, hey, you know what, we did this, this, and this. And it's all of the things that they say that they shouldn't have been doing. There's publicly traded companies in the Serenity plaintiffs. Her Honor kept asking the question of the defendants, hey, how many of you complied with subpart (6). No, Your Honor. When you do your analysis I must request and urge you to consider how many of the plaintiffs did not comply with subpart (6). That's important, because they're seeking

equity. They have to come to Her Honor with clean hands and say, Your Honor, we need this injunction because we have a right and this is good and this is what we need to do. But, Your Honor, they did not adhere to any of this. There's public companies on that side of the aisle. There are -- what else? There are -- Mr. Ritter testified that he used P.O. boxes. Your Honor, one of the only things that's actually very clear in the applications is in the section (c) where it says, you know, where you're going to put the address and everything else. And here they're saying no address, whatever. But the one thing it does says in parens on both 5 and 5A, no P.O. boxes, don't do it. He did it.

THE COURT: But a UPS Store is okay?

MR. GRAF: Your Honor, here's the thing. When you look at Exhibit 303, Exhibit 303 for Clear River, you look at bottom, Mr. Black is a well-known realtor in this town. And what does he do? There's APNs. You got it. You want to see where his place -- where he was going to put it or North Las Vegas, Henderson, Las Vegas, Unincorporated Clark County, you got the APNs. Look them up. That's what I'm saying. I could care less what anybody else does. I could care less. All I want to do is I want to walk out of this room and I want to be to tell Mr. Black, you did everything right, we got a fair hearing shake from that Judge, and I think you should keep your licenses, because there's nothing that they say you did

wrong.

Let's talk about that diversity issue. Let's talk about it. Phony. Illusory. What was the other word? Gamesmanship. I used that in my brief. Go ahead and double check it. I put it in. Gamesmanship. All kinds of stuff. All of these words. And you know what, Your Honor, they're just words. You know who's sitting at that table? Nevada Secretary of State is sitting at that table.

THE COURT: Not anymore.

MR. GRAF: Sure. Do you think he forgot everything he did when he was there for however many years? When did they step up, when did they say, hey, that's about -- your advisory board is a violation of NRS 86 whatever? Did we hear that? I'll stop now if they [inaudible]. No. They don't. Because we didn't violate any law. We didn't violate in principle, because Her Honor is well aware that in an LLC you can do what you want. That's why Nevada's great. Because we have OPAGs that let people say, hey, this is how you're going to run your business. Not Mr. Kemp, not Mr. Gentile to tell us how to run our business. And to say that a woman cannot be on an advisory board or its somehow a sham to put your daughter as the president of the Nevada Dispensary Association on your board for your cannabis company? Are you kidding me? That is completely appropriate. She is one of the bigger attorneys in this town doing administrative law and submitting

these types of applications all over the country.

Your Honor, I was subjected to, and, yes, I'm saying subjected to, Ms. Black because they have applications due in Missouri tomorrow. For the last month they've been working 15-hour days trying to figure out exactly what to do and exactly what people want and exactly what they want to have in each little section of the application. By the way, Your Honor, that's what everybody in this room did when they previously submitted all their applications. Is there some areas that are open to interpretation? Sure. Some of those areas would include, I would venture to say, Your Honor, in the ballot initiative in subsection (5) that says, not only have you been told months after the effective date -- and this is the section where we've been talking about the background checks, Your Honor, and this is before the statute. It says, "Regulations shall include," and then it goes to subpart (6) and it says this, Your Honor. And what I want Her Honor to focus on is what it doesn't say. It says, "The Department shall conduct a background check of each prospective owner, officer, and board member of the marijuana establishment license applicant." Doesn't say when.

So let's talk about all these practicalities. Everybody is like trying to argue and say that this is bad and everything's absolute. That provision says, hey, you've got to do background checks. My question is when do you do it.

There are substantial provisions contained within this ballot initiative within R092-17, and within the NRS and the NAC that all say, hey, you're going to get a conditional license and there's some things you've got to clear up after the conditional license. I don't see why you don't issue a conditional license and then say, okay, then we go fix these people and then these very provisions say if somebody doesn't pass the background check you kick 'em out.

You know, one of the questions I kept asking as we were going through all this testimony is these people are like, oh, yeah, there's bad people there. And everybody's got expulsion clauses in their OPAGs or their bylaws. Somebody's got an excluded felony, you kick 'em out of the company. That's it. But this document, this, what Her Honor is supposed to look at and review, the ballot initiative, doesn't say when that's supposed to occur. Your Honor, the only efficient and reasonable way for that to occur is to occur when you've already whinnied it done, you've gone from the 462 applicants down to whatever it -- it's 17 entities. Do you think it's a little bit different to do a background check on 17 different applicants, quote, unquote? Yeah. It is. Is it less expensive for the State? Yes. Is that a benefit to the people of Nevada if it's less expensive for the State? Yes.

If you read the ballot initiative, one of the only fiscal -- the only fiscal thing that's in there is they say

the Department of Health and Services or BPHS, whatever it's called, has to hire two more people to do the background checks. That's the fiscal analysis that they performed in there. I think it's wrong. I think we've all learned that the testimony is if there's public companies it's going to be much more expensive. But so what? Her Honor made the comment, it's like, well, you know, this isn't gaming or something to that effect and, you know, add to the process itself. Yeah. We're like the case that Mr. Gentile cited, the 1957 case that talks about gaming at that time when, as Mr. Kemp said, gaming for public companies wasn't allowed until later.

It's going to progress. It's going to grow. The Governor has already signed the order that says he's going to create a board much like Gaming, and then they'll have either a board and a commission or vice versa or whatever. But they're making that bureaucracy. And this industry's going to pay for it, and that's the other thing that Her Honor has to consider here. During the -- Her Honor has had testimony at a bare minimum that there's at least two of these defendants that have not been able to open during the pendency of this TRO/preliminary injunction hearing. The loss in revenue to the state of Nevada is weighing heavily on the side of you not granting this preliminary injunction, because they overreached. They overreached. You heard them all say it

yesterday, we want every single one of those licenses not issued. And it's not licenses that are issued. They have some sort of qualification. One qualification was --

THE COURT: Final inspection.

MR. GRAF: -- we want a final inspection. They don't want the licenses issued. Let's call it what it is.

So, Your Honor, just kind of to sum up I want to talk about two broad topics. We don't have multiple licenses, we didn't hire Amanda Connor, but they did. Mr. Ritter testified that he used -- and it was funny how he testified to it. I think he said that --

On page 64, Brian of his testimony. Kind of want to show it to the Court, because I thought it was funny.

She was asked, well, did you -- he was asked a direct question, hey --

Can you pull it up, or not?

THE COURT: So I'm trying to get the A-V guys to the trial, too. It's not Mr. Koch only. The A-V guys got to go over there, because they've got to finish [inaudible].

MR. GRAF: So, Your Honor, Mr. Ritter was asked, hey, did you use it? No. And I'll paraphrase, because I obviously don't have it up there. But it's in there. Oh, we used her for regulatory purposes. So you used her -- and there it is, Your Honor.

"There have been some allegations in this case with

respect to Amanda Connor, by the way, who's a fine person, met her multiple times. Pretty remarkable allegations, frankly based [inaudible]. You're familiar with Ms. Connor. You know who she is; correct?"

"Yes."

"Do you consider her to be a competent attorney??

"She's been helpful for us regulatorily." I didn't know that's a word. "Helpful to TGIG regulatorily?"

"Yes."

Equity, Your Honor. They can get up here and jump around and say that she shouldn't have had calls, she shouldn't have had dinner and she shouldn't have had all of this other stuff. And at the beginning of this hearing there was a lot of saber rattling as to all of these bad things that Her Honor was going to hear. There were some dinners that were done that were everything else. Not with Clear River. And there's no evidence or proof of that ever occurring on behalf Clear River.

And then, Your Honor, there's no proof or evidence as to noncompliance or anything of that nature as to Clear River. And then, Your Honor, the last thing that I wanted to talk about -- well, there's two last things. And it's just to reiterate and show Her Honor the testimony. Mr. Terteryan got up here, a very soft-spoken man who was talking about the documents that he received. And we already talked about those

offers. I wanted to show the Court on page 74 of Mr. Ritter's testimony where he testified that he wasn't an owner. But that's not what he told Mr. Terteryan.

And then on page 64 he testified about using Amanda Connor. But then on page 77 and 78, Brian, at the bottom of 77, "You don't have -- you are not being damaged, you're not receiving --" go to the next page, "-- you're not being hurt, you're not getting any additional income because you didn't qualify; correct?"

"Well, we're certainly hurt without being awarded the licenses, because the licenses themselves have values in the neighborhood of $10 million."

There's no irreparable harm. When you go from 40 to 80 licenses in a county, that's just new licenses. One of that things that Her Honor asked some questions about were, well, you know, there's only 10 in the city and there's 10 in the county, that's only 20, there's 26 plaintiffs, there's not enough. There's plenty. There's 80 in the county, and they're worth about $10 million apiece. There's no irreparable harm. If they can prove that they should have had licenses, there's no irreparable harm. That's the bottom line, Your Honor. That's what we're talking about here, their witnesses, equities that are involved on both sides, Your Honor. And if look at the rest of the plaintiffs in the Serenity case, there's multiple entities that applied for

multiple licenses in the same jurisdictions. That's the plaintiffs. That's the lack of equity. And then you've also got the public companies that exist on that side.

And then the final thing that I wanted to talk about, Your Honor, is this. In terms of a modified injunction or something along those lines I don't think Her Honor has to get there. She doesn't. Because in each and every instance that we're talking about here, the address and the P.O. boxes, there's plaintiffs that have all that. The diversity issue and everything else, we have all of that on their side. The percentage of ownership, there's public companies on that side, too.

And then the final thing is, Your Honor, I, too, would like to thank Her Honor for putting up with us for these many days, and I appreciate your time and consideration of all these facts.

THE COURT: Thank you, Mr. Graf.

Who's next? Ms. Shell.

MS. SHELL: Yes, Your Honor. Thank you.

INTERVENOR DEFENDANT GREENMART'S CLOSING ARGUMENT

MS. SHELL: It's a little difficult following Mr. Graf. I kind of wished as I was sitting there in retrospect that I had gone with my first plan, which was a musical number for everyone. But I'm not ready. So -- and I also realize --

THE COURT: Today's National Tell A Joke Day, so

you're the first. Thank you.

MS. SHELL: Thank you, Your Honor.

And I know there's a part that's difficult but also good for me about going next to last, is that a lot of what I was going to talk to Your Honor about has already been addressed by my friend colleagues in this courtroom. And so I won't belabor it. I just wanted to point out a couple of things and then talk about one issue that has only been touched upon a little bit.

Now, of course, a big topic of conversation during these closings has been background checks and whether the Department properly -- whether the Department exceeded its powers or otherwise acted arbitrarily or capriciously in implementing the regulations and limiting, putting a cap on background checks to only those people with a 5 percent membership interest. And the short answer to that is no. And in order to understand why the answer is no Your Honor has to consider some of the things that plaintiffs don't want you to think about, that they want you to ignore.

Now, as has already been talked about by my colleagues, the plaintiffs would like you to ignore the vast body of caselaw that says this Court has to grant and courts in this State have to grant great deference to an administrative agency like the Department of Taxation when they are making decisions about interpreting and implementing

statutes that they are empowered to determine and implement.

Another thing that they want you to ignore is they want you to read one little bit of Chapter 453D in isolation from all the others. They want -- and particularly they want you to read 453D.200(6) in isolation from all of the other provisions and from all of the subsections within 453D.200.

As Mr. Prince talked about and I believe Mr. Shevorski talked about a bit, under NRS 453D.200(1) the Department is specifically tasked -- it's not like optional for them. It says, "The Department shall adopt regulations that are necessary and convenient to carry out the provisions of the chapter." And not just to carry out the provisions of the Chapter 453D; they're tasked with carrying out the express desire of the Nevada voters. And what did Nevada voters ask for? You could see that right in the -- I call it legislative purpose, but if you look in the purpose section of the NRS 453D, it's at 0202, one of the things that is important and that the voters specifically asked for is a safe and legal way to purchase recreational marijuana. And so the Department is tasked with adopting regulations that will give life to that desire.

And the other thing that they have to do when they're adopting these regulations is make sure that they're not unreasonably impracticable. We already talked about what unreasonably impracticable means aside from having to say that

word. It means that you can't place conditions on licensure that are effectively going to shut the system down.

Now, here the Department properly exercised its discretion to place this 5 percent threshold on background checks for the owners, officers, and board members of the applicants. Now, there is a lot of insinuation during closing argument yesterday from the plaintiffs that this was done in a vacuum, that this was a decision -- they just plucked a number out of the air, they decided to do this just based on whim or caprice. But that's not the case. As Mr. Koch mentioned and as was talked about extensively during Ms. Contine's testimony on Day 13, this was a decision that was recommended -- this 5 percent threshold was actually recommended by the Nevada -- the Governor's Task Force. And one of the members of the Task Force, one of the members of the working group, I believe he was the chair of the working group that came up with this recommendation was Mr. Ritter, who's one of the plaintiffs in this case.

Now -- and we've talked a lot -- a lot of what was talked about during this particular part of Ms. Contine's testimony was Exhibit 2009. And they talked about in this recommendation what the guiding principles the working group considered in proposing this 5 percent threshold. One of the guiding principles that they considered was -- and I was going to have Brian throw this up on the screen, but in the interest

of time I'll just read it to you.

So this is at page 32, lines 5 through 8, on Day 13, Volume 2. The guiding principle is -- we could have put it up -- "Propose efficient and effective regulation that is clear and reasonable and not unduly burdensome." So they thought about that. What's the burden going to be to the applicants, what's the burden going to be to the industry, and ultimately what's the burden going to be to the community that wants to go and have legal, safe access to recreational marijuana.

Another guiding principle that they considered is at page 33, at lines 17 through 23. Another thing that they considered was "The regulations must not prohibit the operation of a marijuana establishment either expressly or through regulations that make their operation unreasonably impracticable." And that came directly from the statute. That comes directly from the NRS 453D.200(1).

So it wasn't done in isolation. This threshold wasn't established just because they wanted to -- this is the number they picked. This is something that they considered. They looked at the guidance that they had -- the Department looked at the guidance that they had under the statutes and they adopted the regulations accordingly.

And we heard a lot of testimony from several witnesses about why particularly in the case of a publicly traded company like GreenMart, my client GreenMart is owned by

a publicly traded company. Not a secret. A lot of testimony about why requiring background checks of every owner of a share of a publicly traded company would be impracticable. Ms. Contine said, well, look, if we had to do this, let's assume, because the membership changes so often, the ownership of these shares changes so often it would shut down the ability to operate, the Department's ability to operate.

And I believe that someone else talked about Mr. Groesbeck, who is another plaintiff in this case, and Mr. Groesbeck when he was on the stand testified that Planet 13 has about 125 million shares outstanding. And how does the Department conduct background checks on a company that size with that kind of shares without bringing the industry, not just the Department, the full industry to a halt? And the answer is you can't. That's something that the members of this industry recognized, that's something that the Task Force recognized, and that's something that the Department recognized.

Thus, they put the 5 percent cap on. And again, that decision is consistent not just with the express purpose of -- not just with their express powers to enact all necessary and convenient regulations to govern the industry. It's consistent with the expressed interests of the people, the voters of Nevada. They said, we want to protect public safety by providing people who are 21 or older with safe,

legal access to recreational marijuana.

Now, another issue that this Court asked us to address, and I know other folks have touched on this, is the issue of diversity and was it appropriate to consider and to weight diversity in these applications.

Now, Mr. Gentile in his closing statement yesterday accused winning applicants of manipulating their board makeups to score higher on diversity. In his words, he said, and I'm going to quote from him here -- it was in the Review-Journal today, too -- that, "Rich white guys went out and rented minorities to score higher on diversity."

So we could spend hours unpacking why that statement's wrong, but I'm just going to pick on a few. The first thing that's wrong with Mr. Gentile's statement is that there is no evidence to support this statement. We've been here for weeks. Months? Months. We've been here for months. It's hard to keep track. I think -- I can't remember who observed, maybe it's Mr. Shevorski, school ended when we started and then the school year started again now that we're wrapping up.

MR. SHEVORSKI: It was Mr. Koch.

MS. SHELL: It was Mr. Koch. But here we are. We've been here three months. You haven't heard any evidence that any applicants paid off people to be on their board. It's not that they didn't try. You may remember that on Day 5

Mr. Kemp called Stacey Dougan, who's a board member of GreenMart, a board member of my client. She's an African-American businesswoman, she's a long-time cannabis activist, she's also a great chef. She owns Simply Pure over in the Container Park. Everybody go try it out. It's really good.

Now, at Volume II of Day 5 at page 138 Mr. Kemp -- and this is at lines 9 through 13 -- Mr. Kemp asked Ms. Dougan really directly. He said, "Okay. Was it your understanding that any of these promises," meaning the promises to be on the board, "would include money?"

And her answer was, "No."

He tried again. He was like, "So there was no -- Okay. So there was no monetary compensation?"

Ms. Dougan answered, not that I can remember.

Now, next Mr. Parker tried to ask -- get this same kind of evidence out of Ms. Dougan, and at page 144 of the same day he was trying to get evidence that she was somehow in cahoots with my client, with GreenMart to juke the stats by putting her on the board. And at 144, line 1, he asked her, "Okay -- right. Did anyone explain to you that diversity would be a factor for the application process in 2018?"

And her answer was, "No."

Mr. Parker, I will give him credit for being thorough, he asked a lot of questions and he kept trying to get that testimony out.

Now, if we skip ahead to the same page to lines 15 through 22 -- I'm sorry. Can you go up just a little, just a few lines up. I'm sorry. I forgot his question. Okay.

And he asked, Mr. Parker asked Stacey, "Did Krista --" Krista's another board member of GreenMart. "Did Krista ever tell you that there were diversity points that would be given for the 2018...process?"

And she answered. She answered honestly, she answered in a way that shows you exactly why she's a member of GreenMart, a board member of GreenMart and why diversity matters. She said -- Ms. Dougan answered, "She didn't tell me that there were -- there's diversity points. But we're big on women-owned business, so that's --" that's what's important to her. And she also said, "I don't know what diversity means. I don't know if it means women, gender, or if you're talking about race, but in this case there were some conversations, like, hey, we really want to make sure that we're taking care of women." This was important. That's why my client was on the board. She wasn't there because someone was paying her off to be there. That's not what was going on. But Mr. Parker asked her -- tried to get that testimony out a few more ways, but you get the point. There's no there there. So that's the first thing that's wrong with Mr. Gentile's statement, lack of evidence.

The second thing that's wrong is that Mr. Gentile's

statement really reflects plaintiffs' own cynical view about diversity. A lot of what they've been talking about is there's not enough transparency in the application process, we didn't know how points were being allotted. And when they complained about things like and they accuse without any evidence whatsoever people like my clients, applicants like my clients of juking things -- juking the stats, of paying people off to be on the board it reflects that maybe that's their own cynicism, that maybe if they knew there was going to be 20 out of 250 points allotted for diversity, maybe they would have done -- they would have done what they've accused defendants and intervenors of doing. That's the second thing.

Now there's the final thing, and this is really -- I'll leave you after this, Your Honor. The final thing that's wrong with Mr. Gentile's statement is his insensitive language. And really Mr. Gentile's statements and so many other -- I've lost count of the other statements made in this courtroom over the past several months illustrate precisely why diversity is directly and demonstrably related to the operation of a marijuana establishment. As Ms. Dougan observed, the marijuana industry is white male space. It's a space that women and people of color haven't been able to break into.

Brian, can you pull up Day 13, going to page 21, 2 through 7.

Ms. Contine also testified about why diversity is important. "If you have a diverse group of people in your organization," she said, "you might be more willing to operate in a community that, you know, has been underserved or have been disserved by the war on drugs or, you know, you have a more friendly face to some communities like that."

So you're taking white space and you're making it a space that's welcoming for everybody.

And I hope I haven't butchered his name, but Judah Zakalik from Zion Gardens also talked about another reason why diversity is important.

And, Brian, if you could pull up Day 16 at page 55, lines 7 through 8.

He said, "Our society's diverse, people that use the product are diverse, the company should be diverse."

He also -- I'm sorry. I -- did I get that right? Yeah, I got that right.

What Mr. Zakalik was talking about is it's important, you need to bring everybody's perspective to the table. And we need those perspectives if we want to continue to -- if we went the marijuana industry to continue to grow and to provide the community safe, legal access to marijuana, which is what the voters wanted. Our community is more diverse now than it's ever been. I've lived here all of my 40 years, and it's an upward trend. Over the past 40 years it

is a community that has consistently become more diverse. And as our community continues to become diverse, the marijuana industry needs to also grow and change so that it can serve the needs of every person in the community that wants to be served and also so that marijuana establishments can be good partners with the community.

And that's not something that happened in a vacuum. And, you know, I would also point you back to 453D.020(3)(b), which is one of the -- you know, the stated purposes of Chapter 453D is to confirm that applicants are suitable to sell recreational marijuana. And in order to be suitable to sell recreational marijuana in this community the Department properly exercised discretion to say diversity should be considered in that.

And with that I will turn it over to Mr. Koch. Thank you, Your Honor.

THE COURT: Thank you, Ms. Shell.

Mr. Hone.

INTERVENOR DEFENDANT LONE MOUNTAIN'S CLOSING ARGUMENT

MR. HONE: Your Honor, I have the honor of batting cleanup today, and so my presentation hopefully is not going to be duplicative or it will be as minimally duplicative as possible. I have a punchlist of items on our side that I would just like to clean up and make sure are in the record on some of the questions that have been raised today and some of

the things that have been raised yesterday and throughout the hearing, and then wrap it up with a little bit of focus back onto why we're here and what the people of Nevada really want here.

As a starting point, to answer the Court's question about 453D.200(b), Lone Mountain -- or I'm sorry, .200(6), Lone Mountain disclosed all of its owners, and they were all background checked, and so we did fall under the issue in that regard.

Going through my punchlist I'm going to jump around real quickly and make some references as quickly as I can with regard to diversity as a ranking criteria. You asked Mr. Shevorski how and when that was made known to applicants prior to submitting applications.

Your Honor -- or, Brian, if you can pull up Exhibit 5A.

I'll represent, Your Honor, Exhibit 5 is the same in this regard. 5A, page 18, Section 6.2 at the bottom, Brian, the last sentence of 6.2, the block paragraph says, "Rankings will be based on compliance with provisions of --" it lists the numbers, and then on the content of the applications relating to 6.2.2 says, "Diversity of the owners, officers, or board members." Again, both 5 and 5A, both versions show that the applicants knew that that would be scored into the process and before they submitted their applications.

With regard to the physical location and land use issue that's been talked about exhaustively I just want to point Your Honor to one additional citation in the statute that I don't think has been brought up in the last two days, but reflects the issue that there are some impossibilities or disagreements amongst the statute about what's possible. I'll refer the Court to NRS 453D.100(2)(d). And it says -- and this is with regard to the effect of the chapter. And it says, "The provisions of this chapter do not prohibit," and then subsection (d) says, "a locality from adopting and enforcing local marijuana control measures pertaining to zoning and land use for marijuana establishments." I think that goes along with what's already been said, which is the statute and the State cannot prohibit local municipalities and the requirement of an address, a physical address at the beginning of the process instead of the final licensing process is a conflict within the statute and the process.

I would also note, Your Honor, we raised the issue of severability both in the pocket brief that we submitted on behalf of the intervenors. It's also in our final brief. But 453D.600 of the statutes, if there's a need to segregate out portions of the statute, the Court has the authority to do that.

I'm going to jump now real quickly to some of the issues that were not the main points Your Honor asked us to

focus on yesterday, but issues that have come up during the course of the proceeding the last three months and came up yesterday again, as well. One is the issue community impact and the scoring process. There's been reference that a physical location was needed to do that. Your Honor, I would just note that the scoring is for community impact, not neighborhood impact. And there's a difference there. And it was reasonable for the State to consider that in the context of the greater community, not a particular neighborhood or physical location.

Second, the issue of disclosure of point scoring the applications, again, both 5A and 5 on pages 17 and 18 break down the scoring point criteria. There has been testimony from Mr. Pupo that the reason it was not broken down any further was so that people did not artificially tailor their applications to try and score points with the scorers. Rather, as Mr. Pupo testified, the rationale there was that by giving general categories people would put in what they were really doing and they would score that without, as he said, giving away the answers.

The next point, quickly, the word "Manpower" has become a dirty word. It's been used as a dirty word throughout these proceedings. I think it's worth noting the record has reflected during the course of these proceedings that Manpower, you know, it's not a derogatory term or

process. The State was not hiring random temporary day employees that were being assigned to them. Rather, the State with its limited resources and budgets went out, hand-picked the people they wanted to do the process, and as a administrative process used Manpower to pay and retain them.

Again, this has been mentioned before, but on the one hand plaintiffs have complained that there was an abdication of oversight by using Manpower employees, but at the same time they've indicated and would say that if we used State employees that we would have, you know, again, stacking the process.

Real quickly, and Ms. Shell touched on this a little bit, a lot of the commentary in closing and a lot of the tone throughout this process the last several months has been making speculation or making allegations without any actual proof. Yesterday we heard comments in reference to this side of the room stacking their boards, exerting improper influence, engaging in clear gamesmanship, favoritism, there being an unequal playing field, and a material advantage. But there's been no indication of any particularities there with regard to any particular applicant. For example, my client, there's been no indication that Lone Mountain used Amanda Connor, was calling Jorge Pupo on the phone. They're just simply allegations. And Your Honor knows that allegations don't amount to proof.

One of the issues that came up yesterday that there was a reference, incidentally, to one of my favorite TV shows as kid, the reruns of "Hogan's Heros" and Sgt. Schultz, the character in that sit-com where he would say, "I see nothing, I hear nothing, I say nothing." There's actually a more -- unfortunately, a saying that is more contemporary now, and that is the saying, "See something, say something." All of these applicants in the room, both sides of the room, knew what the application process was going in. They knew what was required or asked for, and nobody complained about that in advance. I won't belabor the laches issue any further, but I think it's an important issue for the Court to consider.

On the compliance issue I'd like to point the Court to a section of the NRS that I don't think has been raised or pointed out in the proceedings the last two days with regard to the issue of what's required for consideration of compliance. So I'd refer to Court to NRS 453D.210(5)(f)(2) and in (f)(2) of this section it says -- (5) says, "The Department shall approve a license application if the persons who are proposed to be owners, officers, or board members of the proposed marijuana establishment have not served as an owner, officer, or board member for a medical marijuana establishment or a marijuana establishment that has had its registration certificate or license revoked." This is in section, again .210, talking about the acceptance and final

licensing of applications. And we would propose that that compliance issue was or is considered by the statutory provision, and there's been no indication that any license was granted to any entity whose owners, officers, or board members had participated in an establishment with a revoked license.

As the final context to this I'd like us to refocus on why we're here, the issues with recreational license, and how they differ from other privilege licenses in the state of Nevada.

In 2014 when this legislation was written and submitted to the Secretary of State of it was for a new industry that had never been regulated and for which there was no context, there was not a history as in gaming with decades and decades of advancements in the regulatory process. And I think it's important also to keep in mind how that legislation was written. If I didn't understand -- I came into this room as a lay person that did not understand how the ballot initiative and the voting process works, I would have been led to believe by the context or the attempted method of plaintiffs to say that the language of this statute is -- you know, is written in stone and it's an absolutely indication of the will of the Nevada voters. That's not how the process works. The statute was written. I think there was some testimony that may have had some input from lawyers who were, you know, breaking into this space who had submitted to the

Secretary of State after people signed petitions, and there were enough signatures on petitions to submit it to the legislature, who did not pass it, and it ended up on the ballot initiative in 2016. There were no caucuses in your ward or in your county. We didn't have a meeting of all the citizens of Nevada to sit down and hammer out what this language should be. Instead, what most likely happened for most of us is we saw somebody on way into the grocery store who had a clipboard and asked us to sign whether we would like this to go up to the legislature or be put on the ballot. So the language itself may not be the best indication of what the voters of Nevada really wanted.

And we submitted in our pocket brief on behalf of the intervenors a discussion about what the Court should do if the language from the voter initiative, which is now a statute, is ambiguous, inconsistent, or there are impossibilities in there. And in that pocket brief we indicated that the Court should take a similar method to what it would do if the legislature had written a statute that had some inconsistencies or impossibilities within it. And if there were those ambiguities, the Court in a legislative process would go look at the legislative history and what the intent of the legislature was in putting this up as a statute.

We believe that there's no difference in this situation, either. And the best way we would say to figure

out what the will and the intent of the voters of Nevada was or is would be to look at the statewide ballot question, which is Exhibit 2020.

Brian, if you could pull that up real quickly.

Apart from the proposed legislation itself, and your Court can take common sense into its consideration here, what most likely the voters of Nevada saw was Question Number 2, Amendment to the Nevada Revised Statutes where there was a one-paragraph proposal and voters were asked to vote yes or no on this one paragraph. And the three primary points in the question that was in the booth when you voted were, number one, to decriminalize the possession, sale, and growth of marijuana, number 2 was to tax it at 15 percent, and number 3 was to regulate it. I would submit that that is the core will and intent of the people of the state of Nevada.

But if you go further, under the explanation and digest section there's even some additional information that may be the more active voter would go and read through, and in the explanation there's -- it flows over on pages 14 and 15, over to 16. The explanation has a number of paragraphs, and it explains even further what the point of the statute would be. The first paragraph talks about decriminalization. The second paragraph I really want to focus Your Honor on, it talks about how the ballot measure would allow for the operation of marijuana establishments. And within that

paragraph is some important language. And it indicates, and this is reflected in the statutory language, that for the first 18 months the Department of Taxation would only accept license applications for retail marijuana stores, et cetera, from persons holding a medical marijuana establishment registration certificate. So the regulatory scheme was meant to happen quickly, within 18 months, and that first round of license grants were supposed to go to people who already had experience operating medical marijuana facilities in the state of Nevada. And that's what the State has attempted to do within that time frame. And, again, we would -- you know, we take the position that that is what most directly demonstrates the will of the people. And if this process is either set aside or delayed, there are some implications upon what would happen with that process that the voters wanted. And it's been touched on here today, but I would just reiterate that if that 18 months -- once that 18 months lapses the next round of applications does not have to be limited to people who are establishments or entities that have already operated medical marijuana licenses in this state. It would be open to anybody. Any company could come in around the world, around the country, and it would greatly change that next round of licensing. And that 18 months is going to lapse in the near future. And that would impact the safety and the goals of the people of the state of Nevada, including, as Mr. Bice

indicated, a continued room for the black market to operate and for the lack of control of the majority of the marijuana in the state.

Now, Mr. Gentile said something yesterday, and I agree with him. The will of the people of Nevada to regulate recreational marijuana is a sacrosanct directive from the state of Nevada and its voters. But Mr. Gentile and I disagree on how we should determine or what best demonstrates the will of the people. Again, we would propose, Your Honor, that what most clearly demonstrates the will of the people and their intent is that recreational marijuana be decriminalized, taxed, and regulated quickly, with the first round of licenses going to people who have previously had medical marijuana licenses.

The final thing I will say, Your Honor, is that -- and we addressed this in our closing brief, is that to the extent the Court intends to enter an injunction it is required to enter the most narrow injunction possible. My colleagues on the intervenor side have talked about what some of those more narrow injunction relief might be, but we would refer your Court to our briefing on that. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hone.

Are there any other defendants in intervention with a wish to make a closing argument?

So before I decide if I'm going to take a short

break, do you have rebuttal, and how long?

MR. KEMP: I think I'm about 30 minutes, Your Honor.

THE COURT: So we're going to take a break. We'll be back at 1:15. So come back at 1:20. I have two conference calls at 1:05 and [inaudible].

(Court recessed at 12:29 p.m., until 1:24 p.m.)

THE COURT: Mr. Kemp, are you ready?

MR. KEMP: Yes, Your Honor.

(Pause in the proceedings)

THE COURT: All right. You may proceed.

MM DEVELOPMENT PLAINTIFFS' REBUTTAL

MR. KEMP: Your Honor, I'd like to start with the address requirement, and I'm going to try to hit it from two different angles. One, the evidence that was introduced that an address was required, and, two, Mr. Bice talked about -- I don't remember if he used the word "standing," but his brief talks a lot about standing and would the lack of an address make any difference. And so I'd kind of like to talk about it two different angles.

First, the evidence. You know, we talked about the ballot initiative, use of the term "physical address required." The statute uses "physical address required," the regs uses "physical address required." And then we had the testimony. Mr. Shevorski called Director Contine to the stand. She was the director of the Department of Taxation.

She was the one that actually drafted the regulations. Here's what she said about whether or not a physical address was required.

And, Your Honor, this is from the July 12th -- it's hard to believe -- July 12th, 2019. I'm on page 49.

Question, "Okay. And the physical address in your mind could not be a Post Office box?"

Answer, "Right."

Question, "Or one of these companies that maintains Post Office -- fake Post Office places. Couldn't be that, either; right?"

Answer, "I think the idea was to have an office address, essentially."

Question, "Right. So you couldn't use -- I can't remember what it is, UPS --"

The Court, "UPS Stores."

Question, "You couldn't use a UPS Store because that's not a real physical address; right?"

Answer, "I don't think -- I don't think it would be allowed."

This was their principal witness. She was the director of the Department of Taxation. This testimony is from the top person of the agency that's involved in this case, and she says that you could not use a UPS Store.

Let's move on.

THE COURT: Mr. Shevorski.

MR. SHEVORSKI: I'm sorry. I know it's closing, but I have to object for the record. That is not my witness. She was produced pursuant to a subpoena. Pursuant to our policy we provided her.

THE COURT: Thank you.

MR. KEMP: Your Honor, he went first. But, in any event --

THE COURT: It doesn't matter. She was a witness who used to be the director of the DOT.

MR. KEMP: It doesn't matter. She was the director of the DOT, and she drafted the regulations, and she says an address would be required.

And it gets better. This is the next page of her testimony. It's page 49, lines 2 through 18. And we get into what would happen to the app if you didn't have an address. And this is what she says.

Question, "Let me ask it better. Your staff would have been instructed that if they didn't have a physical address apart from a Post Office box or a UPS Store that that application should not be accepted; right?"

Answer, "I think that might be the direction."

Question, "Okay. So the answer to my question is yes?"

Answer, "Yes."

Question, "Okay. And the reason for it is because the statute required it; right?"

"Repeat the question."

"I mean, the reason for your position is because the statute says that?"

"Right."

So here we have the director of the Department of Taxation saying not only was a physical address required by the statute and the regs that she drafted, but saying that the applications should have been rejected if they just used UPS Stores. That's the testimony, Your Honor. They didn't call one single person from the Department of Taxation that said, oh, after Ms. Contine left we did some sort of evaluation and study or something to the effect and we decided to change the regulation. That regulation's never been changed. The regulation as we sit here today still says an address is required.

So what happened in this case is Mr. Pupo was approached by some people who -- you know, I don't want to use the name again, but he was approached by one of the consultants. Apparently someone was having trouble giving physical addresses, and so they flip-flopped right in the middle of the proceeding. And it certainly wasn't organized, because they two applications on the Website until this hearing commenced and they discovered that out, Your Honor.

So there was certainly no organized thing.

But remember the hierarchy here. Contine is the director. She is the boss of the whole Department. Mr. Pupo is under her. He works for her. Under that is Mr. Gilbert, and under that is Cronkhite. So the bottom line here is we have the director saying that the address was required and the applications should have been thrown out.

Now let's move to Mr. Bice's point. Would that make a difference? Well --

Can I have my next chart, Shane.

This is what would have happened if you had taken the -- if you had done what Ms. Contine said and you had disqualified everybody with all these UPS Stores. And I'm just using the county to make a point of understanding, Your Honor. Essence disqualified, Essence Henderson disqualified, NOR disqualified, DeepRoots would have gone from 4 to 1, Helping Hands from 5 to 2, Cheyenne Medical, another Thrive, disqualified. GreenMart, we don't know one way or the other whether they would have been disqualified because they'd redacted so much of their application we can't tell if they gave a physical address. But let's assume that they did. Same is true of Lone Mountain. Those are assumptions. Commerce Park disqualified, UPS Store. Clear River, again, I can't tell you one way or the other whether they gave an address. But the bottom line here is when you disqualify

those five that we know for an absolute fact used a UPS Store MM Development moves from 14 to 9. There's the standing, Your Honor. It shows why this point can be raised at this time.

Now I'd like to flip over to the diversity. The fundamental problem in this case was that the applicants -- or at least with regards to diversity is that there was a manipulation of the diversity by some applicants. And, you know, GreenMart was the biggest cheater. I can't believe some of the things Ms. Shell said. At the time the application was filed GreenMart was owned by a publicly traded Canadian company. That was at the time the application was filed.

Now, when we started this case Ms. Shell told you, oh, that's not true, Your Honor, our public company didn't own them. And then --

Can I have that, Shane, please, 5/30, line 129. From the Shell portion -- I mean the -- it's from the Dougan section.

So if you remember what happened, Your Honor, is Ms. Shell, who told the Court this afternoon that she represents Ms. Dougan, well, actually what really happened is we asked her produce Ms. Dougan and some of the other advisory board members of GreenMart. She refused to do that. I had to serve a subpoena. Ms. Dougan was supposed to come testify on a Thursday. They hired another attorney, not Ms. Shell --

THE COURT: From Marquis Aurbach.

MR. KEMP: -- right, to come in and object. That guy showed up, and he said, oh, Your Honor, Ms. Dougan's a busy woman, you know, she can't be here today. So you said, "Work with Mr. Kemp and try to find a time." So then he started ignoring phone calls, ignoring emails. And so we arranged a conference call that day and we said, when can Ms. Dougan be here, okay. And so he said, can't be there on Friday -- remember, we were going into a two- or three-week break, so that was the last time we could have gotten Ms. Dougan. So he says, can't be there on Friday, Judge, because she's doing her makeup for some cooking show over on Channel 3 or 13.

THE COURT: I remember.

MR. KEMP: Yeah. So, in any event, you ordered that she be here on -- at 1:30 on Friday, and then we took her testimony.

But getting back to my point, when Ms. Shell saw that I was actually going to bring one of these advisory members on, oh, all of a sudden she had a big confession for the Court, which is right here. Your Honor, I was [unintelligible] for the last five days when I told you that GreenMart was not owned by MTX, which is the public company, at the time of the application. That was incorrect, Your Honor, I'm wrong. Because when the truth was going to come out she didn't want to -- well, she tried to correct it.

All right. So here was the problem with GreenMart. And just now, an hour ago she stood up there and said, oh, Your Honor, Ms. Dougan, you know, she's a woman, you know, we've got to promote diversity. She never once said that GreenMart was a Canadian publicly traded company. She never once said that they got 16 diversity points by using this advisory board. She never once admitted or acknowledged that the public company didn't even list their officers and directors, with the exception of two people, which would be Mr. Boyle and Ms. Davola. All the other ones they left out of the application. Instead, they put in this advisory board. And because of that, they got 16 points. We're going to get into it on the standing point in a minute. But you take away that 16 points, they wouldn't have won anything.

So we have the biggest cheater in the case, got the 16 points for diversity when they're a Canadian public company, and then they come in and -- she did it again today, she pretended that Ms. Dougan had something to do with this company. Well, let's take a look at what Ms. Dougan actually said.

First let's start with Ms. Dougan on 133, 2 through 9, Shane.

This is Ms. Dougan's testimony. Seemed like a nice woman, Your Honor. Doesn't know who any of the shareholders or owners were, never met the shareholders or owners, didn't

know that it was owned by a public company.

I think the next one's 136, 11, through 137, 18, Shane.

We tried to see if she knew Mr. Lee, okay. So we referenced the Lee's Liquor's commercials, the billboards he's on. Never met that man, never met Shelby Brown. These the are other fake advisory board members. Never met Caroline Clark, never met anybody, Shelly Hays. Never met Laura Martin, never met Rutledge. There's a part in here where we talk about Lucy Flores. Never met any of them. They never even had a board meeting, Your Honor.

Question, "Okay. So can I assume from that that you've never had a board meeting?"

Answer, "We've never had a board meeting."

This was in July. This was almost a year after they filed their application. It went on.

138, 21 through 25, Shane.

Okay. She didn't even know they won. She didn't even know they won, that they were a successful applicant until a week before she was called to testify. You know, and then we asked her the critical point, you know, all the people that use these advisory boards, they like to pretend that they did it because, oh, we're going to get some input from some people who are diverse. Well, we asked her did she give any advice to the corporation. She never --

138, 21 through 25, and 139, 10, Shane.

Didn't tell her a reason she was on the board. You know, she was a plant for what base, a chef.

Continue, Shane.

Specifically says she never gave them any advice at any time. It was a complete sham, a complete sham to get diversity points.

Now let's turn to Mr. Graf. He says, quote, "My client didn't do a darn thing wrong," okay. Well, what did his client do, which would be Mr. Black? Mr. Black, who with his family is a 100 percent owner of Clear River. They got 12 diversity points. So Mr. Parker referred to this indirectly yesterday. The problem was that white males somehow manipulate the process to get diversity points. And how did he do that? He set up his own little advisory board. And just like the GreenMart advisory board, wasn't recognized by the Secretary of State. They didn't tell the Nevada Secretary of State that these were board members. But when it came time to filet application with the DOT all of a sudden these people are board members.

So what did Mr. Black do? He packed his board with women. And I'm not going to question Tisha Black. If he had just put Tisha Black on the application, no questions would be asked, Your Honor. But that's not what he did. He put on former UNLV basketball players, specifically Flintie Ray

Williams. He put on other people. And as a result of that, here he is, a white male, instead of getting no diversity points --

MR. GRAF: Objection, Your Honor. He's misstating the evidence. The only two board were Ms. Black and --

THE COURT: Overruled. Please don't make a speaking objection.

MR. GRAF: But there's no witness, Your Honor. I want to --

THE COURT: But there's me.

MR. GRAF: Understood, Your Honor.

THE COURT: And you already had your chance to make the argument, Mr. Graf.

MR. GRAF: I get it. He's misstating the evidence.

THE COURT: Overruled.

MR. GRAF: Thank you.

THE COURT: Thank you.

You may continue.

MR. KEMP: Your Honor, the application's in evidence if you want to take a look at who he listed as officers and directors. He listed Flintie Ray Williams as an officer or director. So we explored that a little bit, because for some reason Mr. Black and Mr. Williams were not available to give testimony in this case. But, in any event, we explored with Mr. Hawkins how he felt about Flintie Ray supposedly giving

advice or controlling Clear River or helping Mr. Black out. Here's what Mr. Hawkins had to say.

And, Your Honor, this is from July 15th, 2019, 99.

"Okay. And do you have any problem with seeking his advice in running this company, a local company in the state of Nevada?"

And Mr. Hawkins, question, "Are you saying Flintie is going to run a dispensary?"

Question, "That he's on the board and providing advice and consent to this company. Do you have a problem with that?

Answer, "Let me make sure I understand what you're saying. So you're saying Flintie is on Randy's board?"

"Uh-huh."

"And Flintie is going to give direction to Randy on how to run the business?"

Answer [sic], "Sure."

"I'd say no, that will never happen, only because I know Randy and I know Flintie."

And it continues on 22. Question, "So your response is that Mr. Black won't take the advice?"

Answer, "That's my response."

Your Honor, it wasn't as bad as GreenMart, but it was still -- it was still -- caused them to win when they would have lost. It still was outcome determinative.

And can I have my next chart, Shane.

You've seen this. We took out all of the diversity to show what would have happened if you had no diversity in this process. And so what would have happened -- and this is the County. So M&M would have won. That solves the standing problem that Mr. Bice raises. GreenMart would have lost, Clear River would have lost. So by using these fake advisory boards, both GreenMart and Clear River got a County license.

Let's flip over to the Las Vegas license. Again, here's what would have happened if you take out all the diversity. GreenMart again would have lost, M&M would have won. Solves the standing problem, Your Honor.

And then let's take a look at the evidence on whether or not diversity was directly and demonstrably related. The only testimony that was referred to by the other side was the testimony of Mr. Peckman and I believe one other intervenor that they thought that diversity was directly and demonstrably related.

Well, we had testimony from the DOT on that. They hate it, they don't like it, but we did have testimony.

Can I have Mr. Gilbert's testimony, please, Shane.

Your Honor, this is from Day 4 on May 30th, 2019. That is Mr. Gentile, who did not ask the most simple question he's ever asked in his life.

Question, "I'll bet I can. In determining to

include diversity in the organizational subpart or for that matter any part of the evaluation process for awarding a license how did you find it to be directly and demonstrably related to an applicant's ability to operate a marijuana establishment? What is it about diversity that is connected to the ability to run a marijuana establishment?"

Answer, "I'm not sure I'm the expert to mention that, but I wouldn't think it would demonstrate --

Next page, please, Shane.

Question, "It wouldn't. Thank you."

Answer, "-- the ability."

This is the guy who ran the program. Mr. Gilbert ran the scoring program. He's not number one or two at this day, he's one under Mr. Pupo, and he says in his view that diversity is not related to the operation of a marijuana program.

And let's put this into a little context. Mr. Gilbert was not brand new. He was with the medical marijuana program. So he had been administering the marijuana program for fully five years at the time he supervised the scoring and at the time he gave his testimony. So what better person to say whether it's related or not? But they don't like his testimony, because he kills them on that point, Your Honor, but that's the evidence.

And then finally, Your Honor, I want to go -- a

couple quicky rebuttal points. Okay. Here we go. Mr. Shevorski said, and I quote, he said that, "Mr. Koehler testified that it would bankrupt the company," unquote, to do background checks on everybody. That was not the testimony, Your Honor. Here was the real testimony. This is Mr. Koehler. This is the part where he says it's prohibitive, but he said it was --

Where's the "tragic" part, Shane? Look for -- show me the word "tragic."

THE COURT: It's highlighted, Mr. Kemp.

MR. KEMP: Yeah. "It's tragic that this is something we can do." So not only did he say the company wouldn't be bankrupt, but he said they could do it.

And with regards to M&M I've already said this, but I'll say it again, right before this application process they did -- I can't remember what it was called, a reverse merger or somehow they bought a shell company or whatever it was. They only had 164 shareholders at that time. If the State had wanted to do background checks on each and every one, could have been done, Your Honor. Wouldn't have been prohibitive. Or they could have done what Essence did, which was delay your entry into the public sphere for a couple of months and file the application and then delay it. As you remember, Essence was acquired I think late October, early November by GTI. They could have done that, Your Honor. So it wouldn't even

have been difficult for us to give full and complete background checks that the State had asked for.

And did they call any one of their corporate counsel to tell you, oh, geez, it would be impossible for us? No. They didn't call the Essence corporate counsel, they didn't call Thrive, they didn't call Nevada Organic Remedies. All they include was Mr. Koehler, the M&M corporate counsel, who said, it would be difficult but I would do and I could do it.

Next point Mr. Shevorski said, he said, "Your Honor, none of these applicants have shown that they had a binding lease." That is simply not true. M&M had an existing facility. And, frankly, I can't remember if the lease lasted over there on Sunset for another 10 or 15 years, but we've been making lease payments each and every month since we moved the facility in November to the new location. We pay the rent every month. So it's just not true that nobody had a binding lease. And I think there were others in that boat. Dave Thomas comes to mind and a couple others.

But, in any event -- and I don't know that this makes a difference, but I want it for the record, because sometimes we can go back and do briefing. If a point's not rebutted you could get easy rebuttal. Mr. Bice said, oh, Mr. Kemp and everybody just filed a motion for preliminary injunction. Well, actually, if you look at the title of our motion, we call it, "Or, in the Alternative, for a Writ of

Mandamus." Again, Your Honor, I don't think it's important, but it's just not true that this just injunction sought.

Then Mr. Bice said, well, at most Mr. Kemp and his clients want one license or advancing scoring errors for one license. That's not true, Your Honor. LivFree -- we've gone through this 40-point financial thing a couple times. LivFree, if they got the 40 points they should have got, they would have got five licenses. M&M, I just showed you on the chart they would have got two if diversity hadn't been considered. That's seven licenses, Your Honor, not one.

Mr. Prince -- moving on, Mr. Prince says that we were upset that the injunction was violated, the TRO. No. What I said was that they got us to post a $450,000 bond on the pretext that they weren't going to open up that 3500 West Sahara store. Now they've opened it up, and they're still contesting the bond dissolution. That's what we're upset about.

Next, Mr. Kahn said that, M&M screwed up, Your Honor, it's all their fault that they lost, because they didn't put the fact that there was an existing dispensary as part of the application on both the ID-ed and the non-ID-ed portion of their application. That's what he told the Court. So he said, that's the reason that they should lose.

Can I have Exhibit 20, please, Shane, and then 1031.

Your Honor, true, we didn't complete -- repeat the

whole narrative in both of them, but we did specifically say in both sections that it was an existing facility that has been operated as a fully compliant Nevada-licensed marijuana dispensary and has previously passed Nevada Department of Taxation inspections and approvals. So there is absolutely no basis for his claim that we screwed up the application, you know. And I'm not going to repeat the argument as to why M&M should have got the 20 or the results.

Next Mr. Kahn says, oh, well, LivFree, LivFree should never have gotten the 40 points, because they made another error, they didn't tell, didn't tell on the application that Bilko is owned by Mr. Menzies.

Shane, can I have Exhibit 21, page 130, please.

It's right there, Your Honor. Statement providing the source of cash on hand from the account of Bilko Holdings. This account is the company management account. This account is owned by LivFree Wellness Center's majority owner. It's right there, Your Honor. It was disclosed. That is not the reason. You know, and again, like I said before, when you've got this much of a financial section and you spend 15 minutes reviewing it, really, could these Manpower people have even turned every page? I don't think so. But to blame us for the mistake I just think is not appropriate.

And then finally, Your Honor, LivFree, the result, I've alluded to it. Let me show it to you one more time.

Shane, can I have the LivFree Slide 5 out of 6. The LivFree slide on the scoring error.

If you add the 40 points that they should have got -- and, again, everybody got the 40 points if you had any sort of assets. Even Helping Hands, the company that we heard all the interesting testimony about the Jamesons' involvement, even Helping Hands, who listed 8.9 million of assets and 2 million in debt, they got 40. We, we with 25 times that, we got whatever it was. But these are the differences, Your Honor. With the correct 40 points it's in the red there, we would've won five out of six. We would have won in Reno, Unincorporated Clark, North Las Vegas, Lyon County, Las Vegas. So that goes directly to Mr. Bice's point that we're just talk about one license. We're talking about seven. And that's just us, Your Honor. That's just my two plaintiffs. You know, I -- that's two of the twenty-nine plaintiffs in this case. So the suggestion made that, oh, Judge, you don't need to give them an injunction because somehow or another these licenses will pop up like magic if Mr. Kemp wins the case against the State. That is not true. The legislature has authorized a specific number of licenses for Clark County. The Department of Taxation cannot give any more than his been authorized by the legislature. If these people aren't enjoined from opening the stores and taking those licenses, my remedy is -- the only possible way to get more licenses, and I

don't think it's a remedy, is to go to the legislature and ask them to issue more licenses, to increase the 80 to whatever. So there is no -- there is no remedy, Your Honor. And that's why the injunction should be issued. Thank you.

THE COURT: Thank you.

Mr. Gentile.

SERENITY PLAINTIFFS' REBUTTAL

MR. GENTILE: Mr. Kemp's passion for needing to make that argument overcame my ability to go first. I let him go first.

I have a couple of comments. Number one, in the course of making your decision it seems to me that the mechanics that you must employ, I don't think you have any option, is to use Article 19, Section 2, paragraph 3, where it says that, "An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside, or suspended by the legislature within three years from the date it takes effect." That has to be your touchstone.

And here's why. The regulations -- we don't attack the statute. We've never said that there was anything about the statute itself that was passed in the initiative that is unconstitutional -- our constitutional argument is based upon the regulations, because some of them are unconstitutional and therefore essentially have to be analyzed as amendments or nullifications of the 453D -- or the way that they were

applied. The legislature gave approval to those regulations. The legislature's ability to do so is constricted by Article 19, Section 2, paragraph 3.

Therefore, this is not a situation and cannot be a situation where you do a liberal interpretation of the grant of authority to pass regulations or where the State and the Department of Taxation benefits from deference to its decision-making power. To the extent that the regulation either textually went beyond the delegation or to the extent that the legitimate, constitutionally sound regulations were applied in an unconstitutional manner that's the way you have to approach this decision, because it's not an ordinary situation with an agency coming in benefitting from deference.

Now, there's lots of caselaw that says that an ongoing constitutional violation is irreparable harm where it is affecting someone. In this instance -- and I'm really surprised, because I wouldn't have thought it coming from him -- Mr. Bice is wrong. Market share is a protectable interest. Market share is an intangible property right. Market share, as a matter of fact, is usually what we fight over when we're in an unfair competition litigation under 598A. It becomes important to that litigation. It's what you protect.

THE COURT: I might be aware of that.

MR. GENTILE: Yeah. I'm thinking you are.

THE COURT: Yeah.

MR. GENTILE: Okay. And so under that circumstance there is plenty of federal caselaw that says that the Constitution protects intangible property rights, which is what market share is. It is part of the property liberty analysis in the due process argument.

As recently as March of this year -- and I did this on the fly during the argument, because I was a little surprised by it -- I got online and I see that Judge Jones, Federal Judge Jones in March of this year in a case called Guzy versus Guzy, which is at 2019 Westlaw 136, 8614, identified market share as an interest for which an injunction can issue to protect it. In 2005 Westlaw 158, 3514, Ride the Ducks, Philadelphia versus Duck Boat Tours, which is a Third Circuit case, same result.

So there is in fact a basis for you to issue an injunction to protect the damage that will happen going forward because, as it stands now, the record in this case is clear that if anybody other than the cow counties, I'll give you that, if anybody wants to buy marijuana in the populated areas of this state and even some of the not-so-populated areas, they can do it.

Now, with respect to the rural areas there are five that don't -- that still have a moratorium, so the 99,000 figure has to be reduced by whatever the population of the two counties that don't have moratoria in existence, and one has

to ask themselves how many of those -- let's say it is 99,000. How many are over 21? And how many of those over 21 want to buy marijuana? Because you have to make that analysis for this reason. The way the State gets damaged here, the primary damage would be from a loss of tax revenue, and that is de minimis at best in this situation as compared to what the loss of market share of the plaintiffs will be.

With regard to the --

MR. GRAF: Your Honor, I'm going to object as to talking -- improper argument, lacks foundation as to any market share by any party in this case.

THE COURT: Overruled.

MR. GRAF: Thank you, Your Honor.

MR. GENTILE: Oh, I think Mr. -- I think everybody has testified about market share. Every that owned a dispensary that testified.

With regard to the laches argument, how does one -- how does one put forth a laches argument -- I mean, excuse me, how does one put forth an as-applied argument until the application exists, until the way it is applied? You can't. And most of our arguments here are based on as applied. Not all, but most, the vast majority. So clearly laches has no place in this case at all.

I don't suggest that I remember verbatim everything that I said yesterday in my opening statement, but I can tell

you that what I said I don't believe had the word "right" in it at all when I was dealing with the intervenors being able to go forward and do whatever they wanted to do so long as it's being done at their own risk. I don't think I ever conceded that they had a right. But it doesn't really matter, because we have never come into this courtroom, certainly at the time that we filed this lawsuit -- which, by the way, was filed because the State wouldn't give us any information at all and but for the statute enacted this session we wouldn't have anything. So it's morphed a lot as transparency became available. My position yesterday and from the beginning has been that the intervenors, to the extent that they keep spending money and time chasing what they know may very well be an invalid license because it was issued through a constitutionally improper process, that's their problem. If they want to keep spending the money, they want to keep spending the time, I'm not going tell them they -- I'm not going to ask you to tell them they can't do it, all right. Because at the end of the day it's their decision.

And finally I want to talk about -- well, before I get there, there's been some arguments made about compliance not being necessarily involved in the application and scoring process. I cited it in the opening part of my summation, I'm going to cite it again. NAC 453D.272(g) without further discussion.

And finally diversity. Diversity is a good idea. It's necessary. Nobody has ever criticized that. Certainly I have never criticized that. If the people in this industry that are owners of these establishments have any sensitivity to good citizenship at all, they will employ diversity on their own. The objection that we have made here is making diversity something that should be scored. Because it is not part of the ballot initiative, it was not mentioned in the initiative, it wasn't mentioned anywhere else until amendments started to take place, which was after the initiative. And the initiative can't be amended. And I have to -- when you're making your decision in this case, you know some of the people that own these places, they've been before you on other things or you've met them in the community. Ask yourself the question, would this applicant have listed this person of color or whatever other minority would fit the diversity score if they knew they weren't going to be given points for it? Because that's the most important social question.

I don't have anything further.

THE COURT: Thank you, Mr. Gentile.

Do any of the -- Mr. Bult.

ETW PLAINTIFF'S REBUTTAL

MR. BULT: Very, very quickly, Your Honor.

Mr. Prince brought up two points. I just want to clarify those in rebuttal. I believe that the Thrive

application in Reno has actually been taken off the agenda.

The second point is the commentary that I asked for the regulations to be voided out. That's not what I asked for. I asked that the conditional licenses issued by the Department be declared void because of their -- they are invalid, as they conflict with other portions of the NRS.

And the last thing I want to comment on is Mr. Graf made a side comment about that the ETW plaintiffs had not asked for injunctive relief. That was inadvertent on our part, and certainly we have the right to have the pleadings conform to the evidence. And we'll do that at some point in time.

MR. GRAF: And, Your Honor, we did not agree to this being done by consent. And we're objecting.

THE COURT: Mr. Graf, you don't need to do anything. He didn't ask for an amendment at this time.

MR. GRAF: I understand, Your Honor. I just want to make sure the record's clear that we're not allowing it by consent pursuant to NRCP 51.

THE COURT: Mr. Graf, the matter has already been tried. That's why your consent was implied, because of the issues that were involved, or whether we're going to have other issues discussed later we'll deal with after I make the decision.

Mr. Bult, thank you.

Mr. Parker.

NEVADA WELLNESS CENTER PLAINTIFF'S REBUTTAL

MR. PARKER: Thank you, Your Honor.

Your Honor, since Mr. Gentile ended with diversity, perhaps that's where I'll start. And I'd like to address a comment made by Mr. Shevorski, the part of me addressing diversity. In terms of what the regulations said and in terms of what the application provided the parties or the applicants, certainly those represented on this side of the room, Your Honor, didn't know how diversity would be scored. And if the Court recalls, there's a statute that actually mandates that the State inform the applicants how the scoring would be done. And --

THE COURT: That's part of the regulations.

MR. PARKER: Yes, Your Honor. It is -- actually the regulation is 453D.260, I think paragraph (2).

Do you have that, Shane?

Do you have that in front of you, Your Honor?

THE COURT: I do.

MR. PARKER: It says, "When the Department issues a request for applications pursuant to this section the Department will include in the request the point values that will be allocated to each applicable portion of the application." That we know was not done. That is a violation of the regulation that Mr. Pupo acknowledged during his

testimony.

Now, I will tell you and the Court reminded -- or actually informed, because I don't believe Mr. Bice or Mr. Prince were here when it came up, but the Court informed them that certain testimony had been elicited indicating that parties were informed that diversity was a tiebreaker. Now, I don't think the State even knew how they were going to treat this. And let me tell you why.

If I could have Exhibit 108 brought up, Shane. And it's KP31. So KP stands for Kyril Plaskon, Your Honor. And page 31 is from the extraction report that we got from the [unintelligible]. And so the top email or the top text is from Mr. Plaskon to Steve Gilbert. It says, "Jeanine, Diane, and I don't find race or ethnicity in 453D. Should race have been removed as a part of retail applications? Should evaluators be even looking at diversity? AB 422 doesn't seem to apply, because it's just medical. Did we leave it in this app on accident? Just some thoughts."

Now, the date of this, Your Honor, is September 18 -- I'm sorry, September 19, 2018. This is the date -- the day before the closing of application period. So not only did they not provide the scoring information in the application, it appears they didn't know what they were doing up until the last day. And sometime after I guess September 19th they made a decision on how they would score diversity if scored at all.

So the banter we've heard about diversity and how it would be treated, the State didn't know how they were going to treat it, Your Honor. They certainly didn't tell the applicants, and they certainly had an obligation to tell the applicants.

Now, Your Honor, in terms of diversity, as well, and when I first came to the podium, Your Honor, I wanted to point out that perhaps Mr. Gentile, given some of his remarks yesterday, he and I were not on the same page in terms of diversity. In fact, Mr. Prince brought that up to my attention this morning and tried to confirm it with me where I was on diversity versus Mr. Gentile. I agree with Mr. Gentile that diversity is not within the initiative. You don't see it reflected in the statutes. I think now everyone in the room can understand that both Mr. Gentile and I agree that diversity is important. But I can't talk out of both sides of my mouth. I can't say to this Court that the regulations should follow the statute and the statute should follow the ballot question without recognizing that diversity was not in it.

Now, what I will suggest to this Court is that the arguments offered or suggested by Mr. Shevorski and several of the intervenors I think is disingenuous or at the very least they're talking out of both sides of their mouths. Because if diversity is important, then treat it as if it's important. Don't marginalize diversity by allowing advisory board,

because there's no advisory board even mentioned in the statute or the regulations. It was a creative -- fiction created I would say just to get and garner points that they weren't entitled to. So you can't have it both ways. If you're going to give diversity some meaning, some teeth, then make sure it's owners. Make sure it's real officers. That's not what was done here. This charade -- and I called it a game and I said it was gamesmanship. I wasn't using that word lightly. I was trying to find a nice word, as opposed to saying just flat out cheaters. In fact, I think the Court suggested I used the word "manipulation." That's what's been done here. And we all see it. I don't care if we try to make fun of it in terms of how we approach this Court and this argument, I don't care how we suggest that we found someone who had some tangential or peripheral reason on being on this advisory board. Maybe we just like tall basketball players on a board because we want some height. I don't know. But what I do know, that's not the level playing field that was provided if diversity was to be considered. It just wasn't.

Now, Your Honor, you made some really good points. And I'm not saying this just to say it, but I pointed out yesterday in my closing questions that I asked, questions that the Court asked, and you've asked questions today that I think have not been truly answered by the intervenors. Mr. Prince, Mr. Bice, several others talked about this 5 percent and how

it's reasonable and there may be some support for it based on gaming and other areas that the State may regulate. Your Honor, we know what the statute says. If we go to the statute, 453D.205 -- and actually, Your Honor, let's start at .200, and then we'll get to .205. 453D.200 talks about the duties of the Department. And it speaks about what's required by the State in terms of licensing. And so when I -- when you can compare the regulation to the statute, we know they don't match. I think that's been conceded by the intervenors. But .205 says, "When conducting a background check pursuant to subsection (6)," which comes from 453D.200, "the Department may require each prospective owner, officer, and board member...." Now, the State, as well as intervenors, today spent a lot of time talking about owners. They never mention whether or not their officers have been background checked or their board members. And I don't know if that even includes their advisory board members, because they didn't mention that, either. But if you were to follow the statute, what we do know is that you cannot allow an applicant who has an excluded felony conviction to become a licensee. How can you do that without doing a background check? It's impossible. You have to do it for the prospective owner, the prospective officer, and the prospective board member. Which means when the Court asked the questions of each intervenor when they got, do you know if your owners were, it's not just owners.

It's not just shareholders. The question should be, based on the statute, did all your officers also get background checked, did all your board members also get background checked. Because that's what it requires.

Now, Your Honor, another thing that I thought was either ill informed or perhaps something to just throw it over the Court's head and hope no one really looked into it. This comment about, you know, we can do it later, just don't grant the injunction, Your Honor, and let the State figure out now can we do these background checks now and figure this all out. Well, Your Honor, if you go to 453D.210, paragraph (4), and I don't think we've talked about this part of this statute during the entire 18, 19 days we've been here.

THE COURT: I talked about the word "complete."

MR. PARKER: You did.

THE COURT: I did.

MR. PARKER: But no one talked about 90 days. And that's important. Because it says here, "Upon receipt of a complete marijuana establishment license application the Department shall within 90 days issue the appropriate license if the license application is approved."

Now, think about it, Your Honor. The State came and said, we had 90 days within which to go through all of these and issue those letters, not 90 days plus six months of this hearing. Ninety days. They had until December, roughly, to

get it done. That time has come and gone. If they didn't do it, you can't revive it now, it's too late, it's done, that's it. And the reason why they didn't do it and the reason why we know they could not have done it, because we know the intervenors did not provide all of their owners, plain and simple, much less advisory board members and officers. So that time has come and gone, and there's nothing they can do about it now, Your Honor.

So Mr. Shevorski said something, and it surprised me. It truly surprised me. Mr. Shevorski said, the State doesn't care who gets the license. Now, I think the intention behind the comment was to show that he's unbiased in terms of the intervenors versus the plaintiffs. That's my belief. But you know something, Your Honor? This State, the Department of Taxation should care. They should care that cheaters or manipulators don't get licenses. They should care that those who actually have marijuana -- retail marijuana experience gets a license. They should care that marijuana establishments are in compliance. They should care that owners of marijuana establishments aren't selling to minors. They should care that owners who perhaps have convictions, excluded convictions don't become owners. And the way you do all of those things, Your Honor, the way you do those things is to actually follow the statute and consider compliance. The way you do it actually follow the statute and make all

prospective owners, officers, and board members get background checks. That's how you do it. That's how you show that you care about the Nevada residents, the Nevada taxpayers, people under 21 not getting marijuana. And that's what the State should care about.

I think it was Mr. Prince, and I'm not sure, I don't want to attribute this to him and be wrong, but compliance is actually in the regulation, Your Honor. I think either Mr. Prince or Mr. Bice, someone said that compliance was not in the regulation.

THE COURT: He said it wasn't in the statute.

MR. PARKER: Okay. Well, good enough. I'm assuming that means he -- that someone understands that it's definitely in the regulation.

THE COURT: That would be me.

MR. PARKER: Yes. And so -- thank you, Your Honor.

So if we look at .272, Your Honor --

NAC 453D.272, Shane.

-- (1)(g), it says, "Whether the owners, officers, or board members of the proposed marijuana establishment have direct experience with the operation of a medical marijuana establishment or marijuana establishment in the state and have demonstrated a record of operating such an establishment in compliance with the laws and regulations of the state for an adequate period of time to demonstrate success." Compliance

should have always been considered. The suggestion that Nevada Organic's compliance history was not or should not have been considered is completely wrong.

Now, what we have, Your Honor, is a Department of Taxation that created regulations that were inconsistent with the statute and with the initiative or the ballot question. We also have a Department of Taxation who decided not to enforce their own regulations that were not compliant with the statutes and the ballot question. So, Your Honor, if we could look at Exhibit 309, and this is a year before the applications were submitted. And again, this is the letter from Connor & Connor, Attorneys at Law, to the Nevada Department of Taxation. And it's on behalf of the Nevada Cannabis Coalition. And she's speaking on compliance with NRS 453A and 453D.

The second page of this document has a section titled, "Background Checks of All Owners, Officers, and Board Members."

If you could highlight that for me. Thank you, Shane. The entire paragraph. Can you blow that up? There we go.

And it says, "All owners, officers, and board members must be vetted and have background checks before the license can be issued, and must be maintained." So it's not like this Department did not know this requirement a year

before these applications were submitted. They knew it, they had legal advice on it, and decided not to do it.

And so one other thing, Your Honor. And I would like you to take a look at Exhibit 311.

Please, Shane.

This is why it's important that these background checks are done.

If you could blow up for me the third bullet point.

And this is an email from Karalin Cronkhite to Steve Gilbert dated August 3rd, 2017. So it was just, Your Honor, just about a month and a half after the letter from Connor & Connor. And it says, "The City of Las Vegas is conducting suitability checks through Metro for all owners and agents. This gives them a local background check, as well as pending litigation that apparently is not captured in the federal check that we conduct through DPS. Apparently there have been situations where we've found people with criminal background and warrants for drugs after we approved their agent card."

So when we talk about the safety of our residents and the responsible the Department of Taxation to carry out what the statutes say this is what we're concerned with, ownership of marijuana establishments by people who aren't eligible. So there's a real reason, Your Honor, that this should have been done. They had legal advice that it should have been done, and they simply decided not to.

Now, one other thing I wanted to talk about in terms of laches, and in part, Your Honor, in part the issue about scoring goes to laches. Because how do you object when you don't even know the scoring criteria? How do you object when you don't know how diversity is going to be handled? The State obviously didn't know that. And so how could you object to it? How do you object when Mr. Pupo says himself he wanted to keep these things a secret? Furthermore, Your Honor, how do you object when the Department of Taxation failed to even follow the Nevada Open Meetings Law in terms of postings? We discussed this seems like months ago now, but they posted certain information for the application process. They failed to post any updates on changes to that in accordance with NRS 241. Failed to, Your Honor. So the more information -- and they say knowledge is power, that perhaps if we had been given that information, everyone, not those who just had cell numbers and lunches and dinners and breakfasts and coffees and drinks, but if the public was given that same information through the proper posting in compliance with the Nevada Open Meetings Law, then maybe we could have complained of it then. But we didn't. In fact, even after the scoring came out and we tried to get information, they would not disclose it.

Now, Your Honor, I think the statutes, the initiative, and the regulations were supposed to provide for a fair and level playing field. Certainly there's been no

testimony I can recall, and I spent a long time going through all of the days of this hearing, and I believe every Department, every Department of Taxation representative testified that there were mistakes. And not just careless mistakes, but intentional mistakes. They intended to change the regulation versus the statute in terms of the 5 percent. They intended not to do background checks. They intended not to comply with the statute in terms of revealing the scoring metrics. All of those are intentional decisions, intentional mistakes that go to the heart of providing a level playing field. I don't know how this Court can not enjoin this process and the results of this unfair process given what this Court has heard.

Now, I applaud the intervenors' attorneys for doing something that Mitch Cobeaga always told me, if you don't have the facts, you argue the law, if you don't have the law, then you argue the facts, if you don't have both, just complain about the other side. They've done a lot of complaining. And, you know, I give them that. Took them two and a half, little more than two and a half hours to complain about things they are not supported by, because there are no facts that support their side, and the law doesn't, either. Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Parker.

Do any of the other plaintiffs wish to make a

rebuttal, or have I finished the rebuttal arguments?

Mr. Shevorski, I have a homework assignment for you, because, as the representative of the State, you are the only one in a position to be able to provide this information.

MR. SHEVORSKI: Yes, Your Honor.

THE COURT: And then I need you to give me an estimate on how long it's going to take you to do it.

MR. SHEVORSKI: Okay.

THE COURT: And I want a realistic estimate, not one that keeps you and your staff from sleeping, okay.

MR. PRINCE: What was the last comment? I didn't hear the last comment.

MR. SHEVORSKI: She wants me to be able to sleep.

MR. PRINCE: Oh.

MS. SHELL: Objection, Your Honor.

THE COURT: We've had a couple of times during this where I told them I didn't care if they slept. But this one isn't one of those.

Which successful applicants completed the application in compliance with NRS 453D.200(6), which is the provision that says, "All owners -- " I'm sorry, it says "Each owner," at the time the application was filed in September 2018?

MR. SHEVORSKI: Completed applications, and then --

THE COURT: So I want to know which of the

successful applicants, and I heard an argument today that was a total of 17 different entities --

MR. SHEVORSKI: Yes, Your Honor.

THE COURT: -- complied with the statute, as opposed to the Department's administrative change to the statute which limited it to a 5 percent or greater ownership interest.

MR. SHEVORSKI: Yes, Your Honor.

THE COURT: Because I know there are many, because I have heard testimony during this hearing of various individuals, whether they were successful or unsuccessful, that they included all of their shareholders' or owners' interests.

MR. SHEVORSKI: Yes, Your Honor.

THE COURT: Okay. How long?

MR. SHEVORSKI: I need to talk to Director Young to figure that out. I don't want to give you an estimate and be wrong because I don't know the answer.

THE COURT: Best estimate.

MR. SHEVORSKI: Because of the way you're looking at me, let's say by Tuesday 5:00 o'clock?

THE COURT: Sure. The matter will stand submitted. I'm going to put it on my chambers calendar for next Friday.

When you get the information, Mr. Shevorski, if you will circulate it to all counsel and my law clerk.

MR. SHEVORSKI: Yes. Of course, Your Honor.

THE COURT: Thank you. Have a nice day. And --

THE CLERK: Your Honor --

THE COURT: Yes?

THE CLERK: May I return --

THE COURT: If there were any exhibits that were tendered but not offered, we are going to return them to you. Dulce will prepare receipts for you -- she has the receipts already so you can come pick them up. So don't leave.

THE PROCEEDINGS CONCLUDED AT 2:32 P.M.

* * * * *

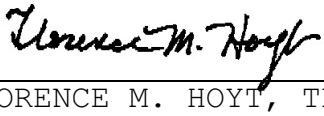
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

8/19/19

DATE

EXHIBIT(S) LIST

Case No.: **A-19-786962-B**

Dept. No.: **XI**

Plaintiff: **SERENITY WELLNESS CENTER, LLC**

vs.

Defendant: **STATE OF NEVADA DEPARTMENT OF TAXATION**

Hearing Date: **MAY 24, 2019**

Judge: **HON. ELIZABETH GONZALEZ**

Court Clerk(s): DULCE ROMEA

Recorder: **JILL HAWKINS**

Counsel for Plaintiff:

Counsel for Defendant:

See 5/24/19 minutes for complete list of appearances.

HEARING BEFORE THE COURT

COURT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date ~~Admitted~~ Marked
1	COURT'S DISCLOSURE RE: FLOWERS RECEIVED			6-10-19 WA
2	DENNIS PRINCE'S POWERPOINT FOR CLOSING ARGUMENT			8-16-19 WA
3	EMAIL FROM MR. SHEVORSKI (SEE 8-22-19 Minute Order)			8-22-19 WD

Meriwether, Danielle LC

From:	Steven G. Shevorski <SShevorski@ag.nv.gov>
Sent:	Wednesday, August 21, 2019 3:23 PM
To:	Meriwether, Danielle LC; 'Michael Cristalli'; 'Vincent Savarese'; 'Ross Miller'; Ketan D. Bhirud; Robert E. Werbicky; David J. Pope; Theresa M. Haar; 'jag@mgalaw.com'; 'rgraf@blacklobello.law'; 'bhiggins@blacklobello.law'; 'alina@nvlitigation.com'; 'Work'; 'Eric Hone, Esq. (eric@h1lawgroup.com)'; 'jamie@h1lawgroup.com'; 'moorea@h1lawgroup.com'; 'jkahn@jk-legalconsulting.com'; 'dkoch@kochscow.com'; 'sscow@kochscow.com'; 'Bult, Adam K.'; 'tchance@bhfs.com'; 'a.hayslett@kempjones.com'; 'Nathanael Rulis, Esq. (n.rulis@kempjones.com)'; 'tparker@pnalaw.net'; 'Fetaz, Maximilien'; 'phil@hymansonlawnv.com'; 'shane@lasvegaslegalvideo.com'; 'joe@lasvegaslegalvideo.com'; 'Pat Stoppard (p.stoppard@kempjones.com)'; 'jdelcarmen@pnalaw.net'; Kutinac, Daniel; 'ShaLinda Creer'; 'Tanya Bain'; 'Karen Wiehl (Karen@HymansonLawNV.com)'; 'Kay, Paula'; 'Dennis Prince (dprince@thedplg.com)'; 'tlb@pisanellibice.com'; 'JTS@pisanellibice.com'
Cc:	Kutinac, Daniel
Subject:	RE: A786962 Serenity - Response to Judge's Question on NRS 453D.200(6)

Case : A-19-786962-B
Dept. 11

Danielle,

The Department of Taxation answers the Court's question as follows:

Court's Question: Which successful applicants completed the application in compliance with NRS 453D.200(6) at the time the application was filed in September 2018?

Answer: The Department of Taxation answers the Court's question in three parts.

First, there were seven successful applicants who are not parties to the coordinated preliminary injunction proceeding. These entities are 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, and TRNVP098 LLC. Accepting as truthful these applicants' attestations regarding who their owners, officers, and board members were at the time of the application, these applications were complete at the time they were filed with reference to NRS 453D.200(6).

Second, there were five successful applicants who are parties to this coordinated preliminary injunction proceeding whose applications were complete with reference to NRS 453D.200(6) if the Department of Taxation accepts as truthful their attestations regarding who their owners, officers, and board members were. These applicants were Clear River LLC, Cheyenne Medical LLC, Essence Tropicana LLC, Essence Henderson LLC, and Commerce Park Medical LLC.

Third, there were four successful applicants who are parties to this proceeding regarding whom the Department of Taxation could not eliminate a question as to the completeness of their applications

with reference to NRS 453D.200(6). These applicants were Helping Hands Wellness Center Inc., Lone Mountain Partners LLC, Nevada Organic Remedies LLC, and Greenmart of Nevada NLV LLC.

With respect to the third group, the Department of Taxation could not eliminate a question as the completeness of the applications due to the following:

1. **Helping Hands Wellness Center, Inc.** – The Department of Taxation could not eliminate a question a question regarding the completeness of the applicant's identification of all of its officers on Attachment A in light of Mr. Terteryan's testimony that he is the Chief Operating Officer and was not listed on Attachment A. The Department of Taxation does note, however, that Mr. Terteryan has been the subject of a completed background check.
2. **Lone Mountain Partners, LLC** – The Department of Taxation could not eliminate a question regarding the completeness of the applicant's identification of all of its owners because the Department could not determine whether Lone Mountain Partners, LLC was a subsidiary of an entity styled "Verona" or was owned by the individual members listed on Attachment A.
3. **Nevada Organic Remedies, LLC** - The Department of Taxation could not eliminate a question regarding the completeness of the applicant's identification of all of its owners because the Department could not determine whether there were shareholders who owned a membership interest in the applicant at the time the application was submitted, but who were not listed on Attachment A, as the applicant was acquired by a publicly traded company on or around September 4, 2018.
4. **Greenmart of Nevada NLV, LLC** - The Department of Taxation could not eliminate a question regarding the completeness of the applicant's identification of all of its owners. The Department could not determine whether the applicant listed all its owners on Attachment A because a subsidiary of a publicly traded company owned a membership interest in the applicant at the time the applicant submitted its application.

In creating this answer, the Department of Taxation sought to answer 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. The Department of Taxation expects that Helping Hands Wellness Center Inc., Lone Mountain Partners LLC, Nevada Organic Remedies LLC, and Greenmart of Nevada NLV LLC may explain why they believe they submitted complete applications in compliance with the provisions of NRS 453D.200(6).

Best regards,

Steve Shevorski

Steve Shevorski
Head of Complex Litigation
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company, TGIG, LLC, a Nevada limited liability company, NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company, NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company, TRYKE COMPANIES SO NV, LLC, a Nevada limited liability company, TRYKE COMPANIES RENO, LLC, a Nevada limited liability company, PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company, GBS NEVADA PARTNERS, LLC, a Nevada limited liability company, FIDELIS HOLDINGS, LLC, a Nevada limited liability company, GRAVITAS NEVADA, LLC, a Nevada limited liability company, NEVADA PURE, LLC, a Nevada limited liability company, MEDIFARM, LLC, a Nevada limited liability company, DOE PLAINTIFFS I through X; and ROE ENTITY PLAINTIFFS I through X, Plaintiff(s), vs. THE STATE OF NEVADA, DEPARTMENT OF TAXATION, Defendant(s). and NEVADA ORGANIC REMEDIES, LLC; INTEGRAL ASSOCIATES LLC d/b/a ESSENCE CANNABIS DISPENSARIES, a Nevada limited liability company; ESSENCE TROPICANA, LLC, a Nevada limited liability company; ESSENCE HENDERSON, LLC, a Nevada limited liability company; CPCM HOLDINGS, LLC d/b/a THRIVE CANNABIS MARKETPLACE, COMMERCE PARK MEDICAL, LLC, a Nevada limited liability company; and CHEYENNE MEDICAL, LLC, a Nevada limited liability company; LONE MOUNTAIN PARTNERS, LLC, a Nevada	Case No. A-19-786962-B Dept. No. 11 **FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING PRELIMINARY INJUNCTION**

limited liability partnership; HELPING HANDS WELLNESS CENTER, INC., a Nevada corporation; GREENMART OF NEVADA NLV LLC, a Nevada limited liability company; and CLEAR RIVER, LLC,

Intervenors.

This matter having come before the Court for an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction beginning on May 24, 2019, and occurring day to day thereafter until its completion on August 16, 2019;[1] Dominic P. Gentile, Esq., Vincent Savarese III, Esq., Michael V. Cristalli, Esq., and Ross J. Miller, Esq., of the law firm Gentile Cristalli Miller Armeni Savarese, appeared on behalf of Serenity Wellness Center, LLC, TGIG, LLC, Nuleaf Incline Dispensary, LLC, Nevada Holistic Medicine, LLC, Tryke Companies SO NV, LLC, Tryke Companies Reno, LLC, Paradise Wellness Center, LLC, GBS Nevada Partners, LLC, Fidelis Holdings, LLC, Gravitas Nevada, LLC, Nevada Pure, LLC, Medifarm, LLC (Case No. A786962-B) (the "Serenity Plaintiffs"); Adam K. Bult, Esq. and Maximilien D. Fetaz, Esq., of the law firm Brownstein Hyatt Farber Schreck, LLP, appeared on behalf of Plaintiffs ETW Management Group LLC, Global Harmony LLC, Green Leaf Farms Holdings LLC, Green Therapeutics LLC, Herbal Choice INC., Just Quality, LLC, Libra Wellness Center, LLC, Rombough Real Estate Inc. dba Mother Herb, NevCann LLC, Red Earth LLC, THC Nevada LLC, Zion Gardens LLC, and MMOF Vegas Retail, Inc. (Case No. A787004-B) (the "ETW Plaintiffs"); William S. Kemp, Esq. and Nathaniel R. Rulis, Esq., of the law firm Kemp, Jones & Coulthard LLP, appeared on behalf of MM Development Company, Inc. and LivFree Wellness LLC (Case No. A785818-W) (the "MM Plaintiffs"); Theodore Parker III, Esq., of the law firm Parker Nelson & Associates, appeared on behalf of Nevada Wellness Center (Case No. A787540-W) (collectively the "Plaintiffs"); Steven G. Shevorski, Esq., Ketan D. Bhirud, Esq., and Theresa M. Haar, Esq., of the Office of the Nevada Attorney General, appeared on behalf of the State of Nevada, Department of Taxation; David R. Koch, Esq., of the law firm Koch & Scow LLC, appeared on behalf

[1] Although a preservation order was entered on December 13, 2018, in A785818, no discovery in any case was done prior to the commencement of the evidentiary hearing, in part due to procedural issues and to statutory restrictions on disclosure of certain information modified by SB 32 just a few days before the commencement of the hearing. As a result, the hearing was much longer than anticipated by any of the participating counsel. In compliance with SB 32, the State produced previously confidential information on May 21, 2019. These documents were reviewed for confidentiality by the Defendants in Intervention and certain redactions were made prior to production consistent with the protective order entered on May 24, 2019.

of Nevada Organic Remedies, LLC; Brigid M. Higgins, Esq. and Rusty Graf, Esq., of the law firm Black & Lobello, appeared on behalf of Clear River, LLC; Eric D. Hone, Esq., of the law firm H1 Law Group, appeared on behalf of Lone Mountain Partners, LLC; Alina M. Shell, Esq., of the law firm McLetchie Law, appeared on behalf of GreenMart of Nevada NLV LLC; Jared Kahn, Esq., of the law firm JK Legal & Consulting, LLC, appeared on behalf of Helping Hands Wellness Center, Inc.; and Joseph A. Gutierrez, Esq., of the law firm Maier Gutierrez & Associates, and Philip M. Hymanson, Esq., of the law firm Hymanson & Hymanson; Todd Bice, Esq. and Jordan T. Smith, Esq. of the law firm Pisanelli Bice; and Dennis Prince, Esq. of the Prince Law Group appeared on behalf of Integral Associates LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, Essence Henderson, LLC, CPCM Holdings, LLC d/b/a Thrive Cannabis Marketplace, Commerce Park Medical, LLC, and Cheyenne Medical, LLC (the "Essence/Thrive Entities"). The Court, having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the evidentiary hearing; and having heard and carefully considered the testimony of the witnesses called to testify; having considered the oral and written arguments of counsel, and with the intent of deciding the Motion for a Preliminary Injunction,[2] makes the following preliminary findings of fact and conclusions of law:

PROCEDURAL POSTURE

Plaintiffs are a group of unrelated commercial entities who applied for, but did not receive, licenses to operate retail recreational marijuana establishments in various local jurisdictions throughout the state. Defendant is Nevada's Department of Taxation ("DoT"), which is the administrative agency responsible for issuing the licenses. Some successful applicants for licensure intervened as Defendants.

The Serenity Plaintiffs filed a Motion for Preliminary Injunction on March 19, 2019, asking for a preliminary injunction to:

a. Enjoin the denial of Plaintiffs applications;

b. Enjoin the enforcement of the licenses granted;

c. Enjoin the enforcement and implementation of NAC 453D;

[2] The findings made in this Order are preliminary in nature based upon the limited evidence presented after very limited discovery permitted on an expedited basis and may be modified based upon additional evidence presented to the Court at the ultimate trial of the business court matters.

d. An order restoring the *status quo ante* prior to the DoT's adoption of NAC 453D; and

e. Several orders compelling discovery.

This Court reviewed the Serenity Plaintiffs' Motion for Preliminary Injunction and at a hearing on April 22, 2019, invited Plaintiffs in related cases, not assigned to Business Court, to participate in the evidentiary hearing on the Motion for Preliminary Injunction being heard in Department 11 for the purposes of hearing and deciding the Motions for Preliminary Injunction.[3]

PRELIMINARY STATEMENT

The Attorney General's Office was forced to deal with a significant impediment at the early stages of the litigation. This inability to disclose certain information was outside of its control because of confidentiality requirements that have now been slightly modified by SB 32. Although the parties stipulated to a protective order on May 24, 2019, many documents produced in preparation for the hearing and for discovery purposes were heavily redacted because of the highly competitive nature of the industry and sensitive financial and commercial information being produced.

All parties agree that the language of an initiative takes precedence over any regulation that is in conflict and that an administrative agency has some discretion in determining how to implement the initiative. The Court gives deference to the agency in establishing those regulations and creating the framework required to implement those provisions in conformity with the initiative.

---

[3] The complaints filed by the parties participating in the hearing seek declaratory relief, injunctive relief and writs of mandate, among other claims. The motions and joinders seeking injunctive relief which have been reviewed by the Court in conjunction with this hearing include:

A786962-B Serenity: Serenity Plaintiffs' Motion for Preliminary Injunction filed 3/19/19 (Joinder to Motion by Compassionate Team: 5/17; Joinder to Motion by ETW: 5/6 (filed in A787004); and Joinder to Motion by Nevada Wellness: 5/10 (filed in A787540)); Opposition by the State filed 5/9/19 (Joinder by Essence/Thrive Entities: 5/23); Opposition by Nevada Organic Remedies: 5/9 (Joinder by Lone Mountain: 5/13; Joinder by Helping Hands: 5/21; and Joinder by Essence/Thrive Entities: 5/23). Application for TRO on OST filed 5/9/19 (Joinder by Compassionate Team: 5/17; and Joinder by ETW: 5/10 (filed in A787004)); Opposition by Nevada Organic Remedies: 5/9 (Joinder by Clear River: 5/9); Opposition by Essence/Thrive Entities: 5/10 (Joinder by GreenMart: 5/10; Joinder by Lone Mountain: 5/11; and Joinder by helping Hands: 5/12).

A785818-W MM Development: MM Plaintiffs' Motion for Preliminary Injunction or Writ of Mandamus filed 5/9/19 (Joinder by Serenity: 5/20 (filed in A786962); Joinder by ETW: 5/6 (filed in A787004 and A785818); and Joinder by Nevada Wellness: 5/10 (filed in A787540)).

The initiative to legalize recreational marijuana, Ballot Question 2 ("BQ2"), went to the voters in 2016. The language of BQ2 is independent of any regulations that were adopted by the DoT. The Court must balance the mandatory provisions of BQ2 (which the DoT did not have discretion to modify);[4] those provisions with which the DoT was granted some discretion in implementation;[5] 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.

FINDINGS OF FACT

1. Nevada allows voters to amend its Constitution or enact legislation through the initiative process. Nevada Constitution, Article 19, Section 2.

---

[4] Article 19, Section 2(3) provides the touchstone for the mandatory provisions:

> . . . . An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.

[5] NRS 453D.200(1) required the adoption of regulations for the licensure and oversight of recreational marijuana cultivation, manufacturing/production, sales and distribution, but provides the DoT discretion in exactly what those regulations would include.

> . . . 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. The regulations shall include:
> (a) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment;
> (b) Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment;
> (c) Requirements for the security of marijuana establishments;
> (d) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under 21 years of age;
> (e) Requirements for the packaging of marijuana and marijuana products, including requirements for child-resistant packaging;
> (f) Requirements for the testing and labeling of marijuana and marijuana products sold by marijuana establishments including a numerical indication of potency based on the ratio of THC to the weight of a product intended for oral consumption;
> (g) Requirements for record keeping by marijuana establishments;
> (h) Reasonable restrictions on signage, marketing, display, and advertising;
> (i) Procedures for the collection of taxes, fees, and penalties imposed by this chapter;
> (j) Procedures and requirements to enable the transfer of a license for a marijuana establishment to another qualified person and to enable a licensee to move the location of its establishment to another suitable location;
> (k) Procedures and requirements to enable a dual licensee to operate medical marijuana establishments and marijuana establishments at the same location;
> (l) Procedures to establish the fair market value at wholesale of marijuana; and
> (m) Civil penalties for the failure to comply with any regulation adopted pursuant to this section or for any violation of the provisions of NRS 453D.300.

2. In 2000, the voters amended Nevada's Constitution to allow for the possession and use of marijuana to treat various medical conditions. Nevada Constitution, Article 4, Section 38(1)(a). The initiative left it to the Legislature to create laws "[a]uthoriz[ing] appropriate methods for supply of the plant to patients authorized to use it." Nevada Constitution, Article 4, Section 38(1)(e).

3. For several years prior to the enactment of BQ2, the regulation of medical marijuana dispensaries had not been taken up by the Legislature. Some have argued in these proceedings that the delay led to the framework of BQ2.

4. In 2013, Nevada's legislature enacted NRS 453A, which allows for the cultivation and sale of medical marijuana. The Legislature described the requirements for the application to open a medical marijuana establishment. NRS 453A.322. The Nevada Legislature then charged the Division of Public and Behavioral Health with evaluating the applications. NRS 453A.328.

5. The materials circulated to voters in 2016 for BQ2 described its purpose as the amendment of the Nevada Revised Statutes as follows:

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

6. BQ2 was enacted by the Nevada Legislature and is codified at NRS 453D.[6]

7. BQ2 specifically identified regulatory and public safety concerns:

> The People of the State of Nevada proclaim that marijuana should be regulated in a manner similar to alcohol so that:
> (a) Marijuana may only be purchased from a business that is licensed by the State of Nevada;
> (b) 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 or sell marijuana;
> (c) Cultivating, manufacturing, testing, transporting and selling marijuana will be strictly controlled through State licensing and regulation;

[6] As the provisions of BQ2 and the sections NRS 453D currently in effect (with the exception of NRS 453D.205) are identical, for ease of reference the Court cites to BQ2 as enacted by the Nevada Legislature in NRS 453D.

(d) Selling or giving marijuana to persons under 21 years of age shall remain illegal;
(e) Individuals will have to be 21 years of age or older to purchase marijuana;
(f) Driving under the influence of marijuana will remain illegal; and
(g) Marijuana sold in the State will be tested and labeled.

NRS 453D.020(3).

8. BQ2 mandated the DoT to "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6).

9. On November 8, 2016, by Executive Order 2017-02, Governor Brian Sandoval established a Task Force composed of 19 members to offer suggestions and proposals for legislative, regulatory, and executive actions to be taken in implementing BQ2.

10. The Task Force's findings, issued on May 30, 2017, referenced the 2014 licensing process for issuing Medical Marijuana Establishment Registration Certificates under NRS 453A. The Task Force recommended that "the qualifications for licensure of a marijuana establishment and the impartial numerically scored bidding process for retail marijuana stores be maintained as in the medical marijuana program except for a change in how local jurisdictions participate in selection of locations."

11. Some of the Task Force's recommendations appear to conflict with BQ2.[7]

---

[7] The Final Task Force report (Exhibit 2009) contained the following statements:

> The Task Force recommends that retail marijuana ownership interest requirements remain consistent with the medical marijuana program. . . .

at 2510.

The requirement identified by the Task Force at the time was contained in NAC 453A.302(1) which states:

> Except as otherwise required in subsection 2, the requirements of this chapter concerning owners of medical marijuana establishments only apply to a person with an aggregate ownership interest of 5 percent or more in a medical marijuana establishment.

The second recommendation of concern is:

> The Task Force recommends that NRS 453A be changed to address companies that own marijuana establishment licenses in which there are owners with less than 5% ownership interest in the company. The statute should be amended to:
> *Limit fingerprinting, background checks and renewal of agent cards to owners officers and board members with 5% or less cumulatively of the company to once every five years;
> *Only require owners officers and board members with 5% or more cumulatively and employees of the company to obtain agent registration cards; and

12. During the 2017 legislative session Assembly Bill 422 transferred responsibility for the registration, licensing, and regulation of marijuana establishments from the State of Nevada Division of Public and Behavioral Health to the DoT.[8]

13. On February 27, 2018, the DoT adopted regulations governing the issuance, suspension, or revocation of retail recreational marijuana licenses in LCB File No. R092-17, which were codified in NAC 453D (the "Regulations").

14. The Regulations for licensing were to be "directly and demonstrably related to the operation of a marijuana establishment." NRS 453D.200(1)(b). The phrase "directly and demonstrably related to the operation of a marijuana establishment" is subject to more than one interpretation.

---

*Use the marijuana establishments governing documents to determine who has approval rights and signatory authority for purposes of signing ownership transfers, applications and any other appropriate legal or regulatory documents.
There was Task Force dissent on the recommendation. The concern with this recommendation was that by changing the requirements on fingerprinting and background checks, the state would have less knowledge of when an owner, officer, and board member commits an offense not allowed under current marijuana law, potentially creating a less safe environment in the state.
at 2515-2516.

[8] Those provisions (a portion of which became NRS 453D.205) are consistent with BQ2:

1. When conducting a background check pursuant to subsection 6 of NRS 453D.200, the Department may require each prospective owner, officer and board member of a marijuana establishment license applicant to submit a complete set of fingerprints and written permission authorizing the Department to forward the fingerprints to the Central Repository for Nevada Records of Criminal History for submission to the Federal Bureau of Investigation for its report.
2. When determining the criminal history of a person pursuant to paragraph (c) of subsection 1 of NRS 453D.300, a marijuana establishment may require the person to submit to the Department a complete set of fingerprints and written permission authorizing the Department to forward the fingerprints to the Central Repository for Nevada Records of Criminal History for submission to the Federal Bureau of Investigation for its report.

15. A person holding a medical marijuana establishment registration certificate could apply for one or more recreational marijuana establishment licenses within the time set forth by the DoT in the manner described in the application. NAC 453D.268.[9]

---

[9] Relevant portions of that provision require that application be made

. . . .by submitting an application in response to a request for applications issued pursuant to NAC 453D.260 which must include:

***

2. An application on a form prescribed by the Department. The application must include, without limitation:

(a) Whether the applicant is applying for a license for a marijuana establishment for a marijuana cultivation facility, a marijuana distributor, a marijuana product manufacturing facility, a marijuana testing facility or a retail marijuana store;

(b) The name of the proposed marijuana establishment, as reflected in both the medical marijuana establishment registration certificate held by the applicant, if applicable, and the articles of incorporation or other documents filed with the Secretary of State;

(c) The type of business organization of the applicant, such as individual, corporation, partnership, limited-liability company, association or cooperative, joint venture or any other business organization;

(d) Confirmation that the applicant has registered with the Secretary of State as the appropriate type of business, and the articles of incorporation, articles of organization or partnership or joint venture documents of the applicant;

(e) The physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishments;

(f) The mailing address of the applicant;

(g) The telephone number of the applicant;

(h) The electronic mail address of the applicant;

(i) A signed copy of the Request and Consent to Release Application Form for Marijuana Establishment License prescribed by the Department;

(j) If the applicant is applying for a license for a retail marijuana store, the proposed hours of operation during which the retail marijuana store plans to be available to sell marijuana to consumers;

(k) An attestation that the information provided to the Department to apply for the license for a marijuana establishment is true and correct according to the information known by the affiant at the time of signing; and

(l) The signature of a natural person for the proposed marijuana establishment as described in subsection 1 of NAC 453D.250 and the date on which the person signed the application.

3. Evidence of the amount of taxes paid, or other beneficial financial contributions made, to this State or its political subdivisions within the last 5 years by the applicant or the persons who are proposed to be owners, officers or board members of the proposed marijuana establishment.

4. A description of the proposed organizational structure of the proposed marijuana establishment, including, without limitation:

(a) An organizational chart showing all owners, officers and board members of the proposed marijuana establishment;

(b) A list of all owners, officers and board members of the proposed marijuana establishment that contains the following information for each person:

(1) The title of the person;

(2) The race, ethnicity and gender of the person;

(3) A short description of the role in which the person will serve for the organization and his or her responsibilities;

(4) Whether the person will be designated by the proposed marijuana establishment to provide written notice to the Department when a marijuana establishment agent is employed by, volunteers at or provides labor as a marijuana establishment agent at the proposed marijuana establishment;

(5) Whether the person has served or is currently serving as an owner, officer or board member for another medical marijuana establishment or marijuana establishment;

(6) Whether the person has served as an owner, officer or board member for a medical marijuana establishment or marijuana establishment that has had its medical marijuana establishment registration certificate or license, as applicable, revoked;

NRS 453D.210(6) mandated the DoT to use "an impartial and numerically scored competitive bidding process" to determine successful applicants where competing applications were submitted.

16. NAC 453D.272(1) provides the procedure for when the DoT receives more than one "complete" application. Under this provision the DoT will determine if the "application is complete and

---

(7) Whether the person has previously had a medical marijuana establishment agent registration card or marijuana establishment agent registration card revoked;
(8) Whether the person is an attending provider of health care currently providing written documentation for the issuance of registry identification cards or letters of approval;
(9) Whether the person is a law enforcement officer;
(10) Whether the person is currently an employee or contractor of the Department; and
(11) Whether the person has an ownership or financial investment interest in any other medical marijuana establishment or marijuana establishment.
5. For each owner, officer and board member of the proposed marijuana establishment:
(a) An attestation signed and dated by the owner, officer or board member that he or she has not been convicted of an excluded felony offense, and that the information provided to support the application for a license for a marijuana establishment is true and correct;
(b) A narrative description, not to exceed 750 words, demonstrating:
(1) Past experience working with governmental agencies and highlighting past experience in giving back to the community through civic or philanthropic involvement;
(2) Any previous experience at operating other businesses or nonprofit organizations; and
(3) Any demonstrated knowledge, business experience or expertise with respect to marijuana; and
(c) A resume.
6. Documentation concerning the size of the proposed marijuana establishment, including, without limitation, building and general floor plans with supporting details.
7. The integrated plan of the proposed marijuana establishment for the care, quality and safekeeping of marijuana from seed to sale, including, without limitation, a plan for testing and verifying marijuana, a transportation or delivery plan and procedures to ensure adequate security measures, including, without limitation, building security and product security.
8. A plan for the business which includes, without limitation, a description of the inventory control system of the proposed marijuana establishment to satisfy the requirements of NRS 453D.300 and NAC 453D.426.
9. A financial plan which includes, without limitation:
(a) Financial statements showing the resources of the applicant;
(b) If the applicant is relying on money from an owner, officer or board member, evidence that the person has unconditionally committed such money to the use of the applicant in the event the Department awards a license to the applicant and the applicant obtains the necessary approvals from the locality to operate the proposed marijuana establishment; and
(c) Proof that the applicant has adequate money to cover all expenses and costs of the first year of operation.
10. Evidence that the applicant has a plan to staff, educate and manage the proposed marijuana establishment on a daily basis, which must include, without limitation:
(a) A detailed budget for the proposed marijuana establishment, including pre-opening, construction and first-year operating expenses;
(b) An operations manual that demonstrates compliance with this chapter;
(c) An education plan which must include, without limitation, providing educational materials to the staff of the proposed marijuana establishment; and
(d) A plan to minimize the environmental impact of the proposed marijuana establishment.
11. If the application is submitted on or before November 15, 2018, for a license for a marijuana distributor, proof that the applicant holds a wholesale dealer license issued pursuant to chapter 369 of NRS, unless the Department determines that an insufficient number of marijuana distributors will result from this limitation.
12. A response to and information which supports any other criteria the Department determines to be relevant, which will be specified and requested by the Department at the time the Department issues a request for applications which includes the point values that will be allocated to the applicable portions of the application pursuant to subsection 2 of NAC 453D.260.

in compliance with this chapter and Chapter 453D of NRS, the Department will rank the applications . . . in order from first to last based on the compliance with the provisions of this chapter and chapter 453D of NRS and on the content of the applications relating to . . ." several enumerated factors. NAC 453D.272(1).

17. The factors set forth in NAC 453D.272(1) that are used to rank competing applications (collectively, the "Factors") are:

> (a) Whether the owners, officers or board members have experience operating another kind of business that has given them experience which is applicable to the operation of a marijuana establishment;
> (b) The diversity of the owners, officers or board members of the proposed marijuana establishment;
> (c) The educational achievements of the owners, officers or board members of the proposed marijuana establishment;
> (d) The financial plan and resources of the applicant, both liquid and illiquid;
> (e) Whether the applicant has an adequate integrated plan for the care, quality and safekeeping of marijuana from seed to sale;
> (f) The amount of taxes paid and other beneficial financial contributions, including, without limitation, civic or philanthropic involvement with this State or its political subdivisions, by the applicant or the owners, officers or board members of the proposed marijuana establishment;
> (g) Whether the owners, officers or board members of the proposed marijuana establishment have direct experience with the operation of a medical marijuana establishment or marijuana establishment in this State and have demonstrated a record of operating such an establishment in compliance with the laws and regulations of this State for an adequate period of time to demonstrate success;
> (h) The (unspecified) experience of key personnel that the applicant intends to employ in operating the type of marijuana establishment for which the applicant seeks a license; and
> (i) Any other criteria that the Department determines to be relevant.

18. Each of the Factors is within the DoT's discretion in implementing the application process provided for in BQ2. The DoT had a good-faith basis for determining that each of the Factors is "directly and demonstrably related to the operation of a marijuana establishment."

19. The DoT posted the application on its website and released the application for recreational marijuana establishment licenses on July 6, 2018.[10]

[10] The DoT made a change to the application after circulating the first version of the application to delete the requirement of a physical location. The modification resulted in a different version of the application bearing the same "footer" with the original version remaining available on the DoT's website.

20. The DoT utilized a question and answer process through a generic email account at marijuana@tax.state.nv.us to allow applicants to ask questions and receive answers directly from the Department, which were not consistent with NRS 453D, and that information was not further disseminated by the DoT to other applicants.

21. In addition to the email question and answer process, the DoT permitted applicants and their representatives to personally contact the DoT staff about the application process.

22. The application period ran from September 7, 2018 through September 20, 2018.

23. The DoT accepted applications in September 2018 for retail recreational marijuana licenses and announced the award of conditional licenses in December 2018.

24. The DoT used a listserv to communicate with prospective applicants.

25. The DoT published a revised application on July 30, 2018. This revised application was sent to all participants in the DoT's listserv directory. The revised application modified a sentence on attachment A of the application. Prior to this revision, the sentence had read, "Marijuana Establishment's proposed physical address (this must be a Nevada address and cannot be a P.O. Box)." The revised application on July 30, 2018, read: "Marijuana Establishment's proposed physical address if the applicant owns property or has secured a lease or other property agreement (this must be a Nevada address and not a P.O. Box). Otherwise, the applications are virtually identical.

26. The DoT sent a copy of the revised application through the listserv service used by the DoT. Not all Plaintiffs' correct emails were included on this listserv service.

27. The July 30, 2018 application, like its predecessor, described how applications were to be scored. The scoring criteria was divided into identified criteria and non-identified criteria. The maximum points that could be awarded to any applicant based on these criteria was 250 points.

28. The identified criteria consisted of organizational structure of the applicant (60 points); evidence of taxes paid to the State of Nevada by owners, officers, and board members of the applicant

in the last 5 years (25 points); a financial plan (30 points); and documents from a financial institution showing unencumbered liquid assets of $250,000 per location for which an application is submitted.

29. The non-identified criteria consisted of documentation concerning the integrated plan of the proposed marijuana establishment for the care, quality and safekeeping of marijuana from seed to sale (40 points); evidence that the applicant has a plan to staff, educate and manage the proposed recreational marijuana establishment on a daily basis (30 points); a plan describing operating procedures for the electronic verification system of the proposed marijuana establishment and describing the proposed establishment's inventory control system (20 points); building plans showing the proposed establishment's adequacy to serve the needs of its customers (20 points); and, a proposal explaining likely impact of the proposed marijuana establishment in the community and how it will meet customer needs (15 points).

30. An applicant was permitted to submit a single application for all jurisdictions in which it was applying, and the application would be scored at the same time.

31. By September 20, 2018, the DoT received a total of 462 applications.

32. In order to grade and rank the applications the DoT posted notices that it was seeking to hire individuals with specified qualifications necessary to evaluate applications. The DoT interviewed applicants and made decisions on individuals to hire for each position.

33. When decisions were made on who to hire, the individuals were notified that they would need to register with "Manpower" under a pre-existing contract between the DoT and that company. Individuals would be paid through Manpower, as their application-grading work would be of a temporary nature.

34. The DoT identified, hired, and trained eight individuals to grade the applications, including three to grade the identified portions of the applications, three to grade the non-identified

portions of the applications, and one administrative assistant for each group of graders (collectively the "Temporary Employees").

35. It is unclear how the DoT trained the Temporary Employees. While portions of the training materials were introduced into evidence, testimony regarding the oral training based upon example applications was insufficient for the Court to determine the nature and extent of the training of the Temporary Employees.[11]

36. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria set forth therein and the provisions of the Ballot Initiative and the enabling statute.

37. When the DoT received applications, it undertook no effort to determine if the applications were in fact "complete and in compliance."

38. In evaluating whether an application was "complete and in compliance" the DoT made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).

39. For purposes of grading the applicant's organizational structure and diversity, if an applicant's disclosure in its application of its owners, officers, and board members did not match the DoT's own records, the DoT did not penalize the applicant. Rather the DoT permitted the grading, and in some cases, awarded a conditional license to an applicant under such circumstances, and dealt with the issue by simply informing the winning applicant that its application would have to be brought into conformity with DoT records.

40. The DoT created a Regulation that modified the mandatory BQ2 provision "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant" and determined it would only require information on the

[11] Given the factual issues related to the grading raised by MM and LivFree, these issues may be subject to additional evidentiary proceedings in the assigned department.

application from persons "with an aggregate ownership interest of 5 percent or more in a marijuana establishment." NAC 453D.255(1).

41. NRS 453D.200(6) provides that "[t]he DoT shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." The DoT departed from this mandatory language in NAC 453D.255(1) and made no attempt in the application process to verify that the applicant's complied with the mandatory language of the BQ2 or even the impermissibly modified language.

42. The DoT made the determination that it was not reasonable to require industry to provide every owner of a prospective licensee. The DOT's determination that only owners of a 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.

43. The limitation of "unreasonably impracticable" in BQ2[12] does not apply to the mandatory language of BQ2, but to the Regulations which the DoT adopted.

44. The adoption of NAC 453D.255(1), as it applies to the application process is an unconstitutional modification of BQ2. [13] The failure of the DoT to carry out the mandatory provisions of NRS 453D.200(6) is fatal to the application process.[14] 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.

---

[12] NRS 453D.200(1) provides in part:

> The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable.

[13] For administrative and regulatory proceedings other than the application, the limitation of 5% or greater ownership appears within the DoT's discretion.

[14] That provision states:

> 6. The Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant.

45. 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.

46. 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. This decision was a violation of the Nevada Constitution, an abuse of discretion, and arbitrary and capricious.

47. 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.[15]

48. 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.

49. Pursuant to NAC 453D.295, the winning applicants received a conditional license that will not be finalized unless within twelve months of December 5, 2018, the licensees receive a final inspection of their marijuana establishment.

[15] Some applicants apparently provided the required information for each prospective owner, officer and board member. Accepting as truthful these applicants' attestations regarding who their owners, officers, and board members were at the time of the application, these applications were complete at the time they were filed with reference to NRS 453D.200(6). These entities are 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, and TRNVP098 LLC, Clear River LLC, Cheyenne Medical LLC, Essence Tropicana LLC, Essence Henderson LLC, and Commerce Park Medical LLC. See Court Exhibit 3 (post-hearing submission by the DoT).

50. The few instances of clear mistakes made by the Temporary Employees admitted in evidence do not, in and of themselves, result in an unfair process as human error occurs in every process.

51. Nothing in NRS 453D or NAC 453D provides for any right to an appeal or review of a decision denying an application for a retail recreational marijuana license.

52. There are an extremely limited number of licenses available for the sale of recreational marijuana.

53. The number of licenses available was set by BQ2 and is contained in NRS 453D.210(5)(d).

54. Since the Court does not have authority to order additional licenses in particular jurisdictions, and because there are a limited number of licenses that are available in certain jurisdictions, injunctive relief is necessary to permit the Plaintiffs, if successful in the NRS 453D.210(6) process, to actually obtaining a license, if ultimately successful in this litigation.

55. The secondary market for the transfer of licenses is limited.[16]

56. If any findings of fact are properly conclusions of law, they shall be treated as if appropriately identified and designated.

CONCLUSIONS OF LAW

57. "Any person...whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." NRS 30.040.

58. A justiciable controversy is required to exist prior to an award of declaratory relief. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

[16] The testimony elicited during the evidentiary hearing established that multiple changes in ownership have occurred since the applications were filed. Given this testimony, simply updating the applications previously filed would not comply with BQ2.

59. NRS 33.010 governs cases in which an injunction may be granted. The applicant must show (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.

60. Plaintiffs have the burden to demonstrate that the DoT's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy.

61. The purpose of a preliminary injunction is to preserve the *status quo* until the matter can be litigated on the merits.

62. In *City of Sparks v. Sparks Mun. Court,* the Supreme Court explained, "[a]s a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm." 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013).

63. Article 19, Section 2 of the Constitution of the State of Nevada provides, in pertinent part:

> "1. Notwithstanding the provisions of section 1 of article 4 of this constitution, but subject to the limitations of section 6 of this article, **the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls**.
>
> ...
>
> 3. If the initiative petition proposes a statute or an amendment to a statute, the person who intends to circulate it shall file a copy with the secretary of state before beginning circulation and not earlier than January 1 of the year preceding the year in which a regular session of the legislature is held. After its circulation, it shall be filed with the secretary of state not less than 30 days prior to any regular session of the legislature. The circulation of the petition shall cease on the day the petition is filed with the secretary of state or such other date as may be prescribed for the verification of the number of signatures affixed to the petition, whichever is earliest. The secretary of state shall transmit such petition to the legislature as soon as the legislature convenes and organizes. The petition shall take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby shall be enacted or rejected by the legislature without change or amendment within 40 days. If the proposed statute or amendment to a statute is enacted by the legislature and approved by the governor in the same manner as other statutes are enacted, such statute or amendment to a statute shall become law, but shall be subject to referendum petition as provided in section 1 of this article.

If the statute or amendment to a statute is rejected by the legislature, or if no action is taken thereon within 40 days, the secretary of state shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election. If a majority of the voters voting on such question at such election votes approval of such statute or amendment to a statute, it shall become law and take effect upon completion of the canvass of votes by the supreme court. **An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect**."

(Emphasis added.)

64. The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [I]nitiative 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).

65. BQ2 provides, "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." NRS 453D.200(1). This language does not confer upon the DoT unfettered or unbridled authority to do whatever it wishes without constraint. 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.

66. Where, as here, amendment of a voter-initiated law is temporally precluded from amendment for three years, the administrative agency may not modify the law.

67. NRS 453D.200(1) provides that "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." The Court finds that the words "necessary or convenient" are susceptible to at least two reasonable interpretations. This limitation applies only to Regulations adopted by the DoT.

68. While the category of diversity is not specifically included in the language of BQ2, the evidence presented in the hearing demonstrates that a rational basis existed for the inclusion of this category in the Factors and the application.

69. The DoT's inclusion of the diversity category was implemented in a way that created a process which was partial and subject to manipulation by applicants.

70. The DoT staff provided various applicants with different information as to what would be utilized from this category and whether it would be used merely as a tiebreaker or as a substantive category.

71. Based upon the evidence adduced, the Court finds that the DoT selectively discussed with applicants or their agents the modification of the application related to physical address information.

72. The process was impacted by personal relationships in decisions related to the requirements of the application and the ownership structures of competing applicants. This in and of itself is insufficient to void the process as urged by some of the Plaintiffs.

73. The DoT disseminated various versions of the 2018 Retail Marijuana Application, one of which was published on the DoT's website and required the applicant to provide an actual physical Nevada address for the proposed marijuana establishment, and not a P.O. Box, (*see* Exhibit 5), whereas an alternative version of the DoT's application form, which was not made publicly available and was distributed to some, but not all, of the applicants via a DoT listserv service, deleted the requirement that applicants disclose an actual physical address for their proposed marijuana establishment. *See* Exhibit 5A.

74. The applicants were applying for conditional licensure, which would last for 1 year. NAC 453D.282. The license was conditional based on the applicant's gaining approval from local

authorities on zoning and land use, the issuance of a business license, and the Department of Taxation inspections of the marijuana establishment.

75. The DoT has only awarded conditional licenses which are subject to local government approval related to zoning and planning and may approve a location change of an existing license, the public safety apsects of the failure to require an actual physical address can be cured prior to the award of a final license.

76. By selectively eliminating the requirement to disclose an actual physical address for each and every proposed retail recreational marijuana establishment, the DoT 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.

77. The hiring of Temporary Employees was well within the DoT's discretionary power.

78. The evidence establishes that the DoT failed to properly train the Temporary Employees. This is not an appropriate basis for the requested injunctive relief unless it makes the grading process unfair.

79. The DoT failed to establish any quality assurance or quality control of the grading done by Temporary Employees.[17] This is not an appropriate basis for the requested injunctive relief unless it makes the grading process unfair.

80. The DoT made licensure conditional for one year based on the grant of power to create regulations that develop "[p]rocedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment." NRS 453D.200(1)(a). This was within the DoT's discretion.

[17] The Court makes no determination as to the extent which the grading errors alleged by MM and Live Free may be subject to other appropriate writ practice related to those individualized issues by the assigned department.

81. Certain of DoT's actions related to the licensing process were nondiscretionary modifications of BQ2's mandatory requirements. The evidence establishes DoT's deviations constituted arbitrary and capricious conduct without any rational basis for the deviation.

82. 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." NRS 453D.200(6).

83. 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.

84. Under the circumstances presented here, the Court concludes that certain of the Regulations created by the DoT are unreasonable, inconsistent with BQ2 and outside of any discretion permitted to the DoT.

85. 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.

86. 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.

87. The balance of equities weighs in favor of Plaintiffs.

88. "[N]o restraining order or preliminary injunction shall issue except upon the giving of adequate security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained." NRCP 65(d).

89. The DoT stands to suffer no appreciable losses and will suffer only minimal harm as a result of an injunction.

90. Therefore, a security bond already ordered in the amount of $400,000 is sufficient for the issuance of this injunctive relief.[18]

91. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

/ / / / /

[18] As discussed during the preliminary injunction hearing, the Court sets a separate evidentiary hearing on whether to increase the amount of this bond. That hearing is set for August 29, 2019, at 9:00 a.m.

ORDER

IT IS HEREBY ADJUDGED ORDERED AND DECREED that Plaintiffs' Motions for Preliminary Injunction are granted in part.

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.[19]

The issue of whether to increase the existing bond is set for hearing on August 29, 2019, at 9:00 am.

The parties in A786962 and A787004 are to appear for a Rule 16 conference September 9, 2019, at 9:00 am and submit their respective plans for discovery on an expedited schedule by noon on September 6, 2019.

DATED this 23rd day of August 2019.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on the date filed, this Order was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

Dan Kutinac

[19] As Court Exhibit 3 is a post-hearing submission by the DoT, the parties may file objections and/or briefs related to this issue. Any issues related to the inclusion or exclusion from this group will be heard August 29, 2019, at 9:00 am.