IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION TGIG, LLC; NEVADA HOLISITIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; THC NEVADA, LLC; HERBAL CHOICE, INC.; RED EARTH LLC; NEVCANN LLC, GREEN THERAPEUTICS LLC; AND GREAN LEAF FARMS HOLDINGS LLC, Appellants, vs. THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TAXATION, Respondent.	Supreme Court Case No.: 82014 District Court Case No.: A787004

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Elizabeth Gonzalez, District Judge
District Court Case No. A-19-787004-B consolidated with:
A-18-785818-W
A-18-786357-W
A-19-786962-B
A-19-787035-C
A-19-787540-W
A-19-787726-C
A-19-801416-B

APPELLANTS THC NEVADA, LLC AND HERBAL CHOICE, INC.'S OPENING BRIEF

AMY L. SUGDEN, ESQ.
Nevada Bar No. 9983
E-mail: amy@sugdenlaw.com
Sugden Law
9728 Gilespie Street
Las Vegas, Nevada 89141
Telephone: (702) 625-3605
SIGAL CHATTAH, ESQ.
Nevada Bar No. 8264
5875 S. Rainbow Blvd. #203
Las Vegas, Nevada 89118
Email: Chattahlaw@gmail.com
ATTORNEYS FOR APPELLANTS THC NEVADA, LLC
& HERBAL CHOICE, INC.

APPELLANTS' NRAP 26.1 DISCLOSURE

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

1. Appellant THC Nevada, LLC is a Nevada limited liability company that has no parent corporation and there is no publicly held company that owns 10% or more of the company's shares.
2. Appellant Herbal Choice, Inc. is a Nevada corporation that has no parent corporation and there is no publicly held company that owns 10% or more of the company's stock.
3. Adam K. Bult, Esq., Maximilien D. Fetaz, Esq., and Travis Chance of Brownstein Hyatt Farber Schreck, LLP and Adam R. Fulton, Esq. of Jennings & Fulton, Ltd. are the attorneys that have previously appeared for the Appellants in district court on this matter.
4. Amy L. Sugden, Esq. of Sugen Law and Sigal Chattah, Esq. of the Chattah Law Group also appeared in district court and continue to appear for the Appellants in this matter.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(3) because the district courtorder entered on September 3, 2020, granted a permanent injunction. (Vol. 333 JPA 046848-046877) Notice of entry of the permanent injunction was filed and served on September 22, 2020. (Vol. 333 JPA 046845-046846). Subsequent motion practice occurred in which various parties attempted to modify the permanent injunction which requests were denied through an order issued on October 27, 2020. (Vol. 340 JPA 047863-047870). THC NEVADA, LLC ("THC NV") and HERBAL CHOICE, INC. ("Herbal Choice") (collectively "Appellants") timely filed a joint notice of appeal on November 4, 2020 as provided in NRAP 4(a). Additionally, other parties filed their respective notices of appeal. These matters were subsequently consolidated pursuant to NRAP 3(b)(2).

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court under NRAP 17(a)(11)-(12), because the principal issues herein raise questions of first impression involving the United States and Nevada Constitutions and also raise issues of statewide public importance. The principal issue in this consolidated appeal is did the district court fail to implement and safeguard the ballot initiative as enacted by the Nevada voters? This case does not fall within any of the categories of the cases listed in NRAP 17(b) as presumptively assigned to the Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED

I. **Did the District Court Err in Failing to Permanently Enjoin and/or Otherwise Revoke the Issuance of Licenses Who Failed to Provide Complete Applications?**

   a. **Did the District Court Err in Failing to Permanently Enjoin and/or Otherwise Revoke the Issuance of Licenses from Applicants Who Failed To Identify an Actual Physical Address for Proposed Retail Recreational Marijuana Establishment Pursuant to NRS 453D.210(5)?**

   b. **While the Court Permanently Enjoined the State From Conducting a Final Inspection of Any Conditional Licenses Issued in December 2018 For Applicants Who Did Not Provide the Identification of Each Prospective Owner, Officer, and Board Member As Required by NRS 453D.200(6), did the District Court Impermissibly Allow the State Full Authority to Nullify this Permanent Injunction?**

II. **Was THC NV Denied Equal Protection Under the Law When its Distribution Application Was Summarily Denied by the DOT For Misinformation Contained in Its Application and Issued a $10,000.00 Fine Compared to When Other Applicants Provided Misinformation on Their Dispensary Applications, And Were Awarded a Coveted Dispensary License?**

Appellants also join in all other relevant issues/arguments submitted in the opening briefs by other plaintiffs/appellants to this appeal hereto.

STATEMENT OF THE CASE

This is a dispute with numerous entities suing the State of Nevada, on relation of its Department of Taxation (the "DOT") for significant irregularities and lack of fairness and transparency within the 2018 retail recreational marijuana dispensary

application licensing process, which led to the Appellants being wrongfully denied equal opportunity to participate in the application process, and numerous intervening defendants defending the DOT in order to protect their wrongfully awarded licenses (the "Wrongfully Awarded Licenses"). Ultimately, after a nearly three week bench trial[1], the district court did in fact find numerous significant issues within the process by which the Wrongfully Awarded Licenses were issued, including but not limited to the following: (1) confusion in the DOT's issuance and limited dissemination of a revised application more than three weeks after the initial application was published on July 6, 2018; (2) that certain industry participants were provided direct access to the DOT Deputy Director, Jorge Pupo ("Pupo"), regarding the application despite the application instructions to direct all inquiries to a singular generic email address for answering; (3) that based upon testimony at trial it was unclear how the DOT trained the temporary employees hired to grade the applications but based on the evidence adduced, the district court found that the lack of training for the graders affected their ability to evaluate the applications objectively and impartially; (4) that in evaluating whether an application was "complete and in compliance", the DOT made no effort to verify owners, officer or board members (except for checking whether a transfer request was made and remained pending before the DOT); (5) the DOT acted beyond

[1] This litigation encompasses three phases, the second of which (Phase II) is the portion to which Appellants herein appeal.

its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement instituted by a ballot initiative, for the background check of each prospective owner, officer and board member with the 5% or greater standard in NAC 453.255(1); (6) for purposes of grading the applicant's organization 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 record, the DOT did not penalize the application; (7) Pupo's failure to preserve evidence (despite the issuance of a preservation order) reflects the preferential access and treatment provided to certain applicants; (8) 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 a lack of a fair process; and (9) the DOT's departure from its stated single point of contact and the degree of direct personal contact outside the single point of contract process provided unequal, advantageous and supplemental information to some applicants and is evidence of a lack of a fair process and created uneven playing field because of the unequal information available to potential applicants. (Vol. 333 JPA 046848-046877)

And yet with all the foregoing factual determinations, the only relief provided was the confirmation of injunctive relief previously issued enjoining the DOT from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). (Vol. 333 JPA 046876). However, this was after the district court had already allowed the DOT to unilaterally determine that applicants were no longer in fact enjoined under the court's ruling. (Vol. 340 JPA 047863-047882) Thus, in effect the district court's singular order for relief, ***despite all the previous factual findings of significant irregularities and lack of fairness and transparency within the 2018 retail recreational marijuana licensing process***, had no actual effect in remedying the wrongs that had been committed by the DOT and in contravention of the Nevada Constitution. Thus, the Appellants herein seek relief from this Court in order to correct the errs at the district court level, including compelling the protections of our Constitution and thereby instilling actual confidence and trust in our state government.

STATEMENT OF THE FACTS

Nevada allows voters to amend its Constitution or enact legislation through the initiative process. Nevada Constitution, Article 19, Section 2. (Vol. 333 JPA 046855) 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). (Vol. 333 JPA 046855) 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). (Vol. 333 JPA 046855). In 2013, Nevada's legislature enacted NRS 453A, which allows for the cultivation and sale of medical marijuana. (Vol. 333 JPA 046855) The Legislature described the requirements for the application to open a medical marijuana establishment. NRS 453A.322. (Vol. 333 JPA 046855) The Nevada Legislature then charged the Division of Public and Behavioral Health with evaluating the applications. NRS 453A.328. (Vol. 333 JPA 046855)

In 2016, the initiative for the legalization of recreational marijuana was presented to Nevada voters by way of Ballot Question 2 ("BQ2"2), known as the "Regulation and Taxation of Marijuana Act", which proposed an 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?

(Vol. 333 JPA 046855-046856)

BQ2 was enacted by the Nevada Legislature and is codified at NRS 453D.[2] 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;
>
> (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). (Vol. 333 JPA 046856)

BQ2 mandated the DOT to "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant."

[2] As the provisions of BQ2 and the sections of NRS 453D in effect at the time of the application process (with the exception of NRS 453D.205) are identical, for ease of reference Appellants cite to BQ2 as enacted by the Nevada Legislature during the 2017 session in NRS 453D.

NRS 453D.200(6). (Vol. 333 JPA 046856)

NRS 453D.205 provides as follows:

> 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.

(Vol. 333 JPA 046857)

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. (Vol. 333 JPA 046856) The Nevada Tax Commission adopted temporary regulations allowing the state to issue recreational marijuana licenses by July 1, 2017 (the "Early Start Program"). (Vol. 333 JPA 046856) Only medical marijuana establishments that were already in operation could apply to function as recreational retailers during the

early start period. (Vol. 333 JPA 046856) The establishments were required to be in good standing and were required to pay a one-time, nonrefundable application fee as well as a specific licensing fee. (Vol. 333 JPA 046856) The establishment also was required to provide written confirmation of compliance with their municipality's zoning and location requirements. (Vol. 333 JPA 046856)

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. (Vol. 333 JPA 046857) 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." (Vol. 333 JPA 046857)

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. (Vol. 333 JPA 046857) 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"). (Vol. 333 JPA 046857). The Regulations for licensing were to be "directly and demonstrably related to the operation of a marijuana establishment."

NRS 453D.200(1)(b). (Vol. 333 JPA 046857)

Appellants were issued marijuana establishment licenses involving the cultivation, production and/or sale of medicinal marijuana in or about 2014. (Vol. 333 JPA 046857) 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. (Vol. 333 JPA 046858)

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. (Vol. 333 JPA 046859)

NAC 453D.272(1) provides the procedure for when the DOT receives more than one "complete" application for a single county. (Vol. 333 JPA 046859-046860) Under this provision the DOT will determine if the "application is complete and 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). (Vol. 333 JPA 046859-046860) The factors set forth in NAC 453D.272(1) that are used to rank competing applications received for a single county (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 incompliance 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.

(Vol. 333 JPA 046860)

The DOT posted the recreational dispensary application on its website on July

6, 2018. (Vol. 333 JPA 046861) After the posting of the application on July 6, 2018, Jorge Pupo ("Pupo"), then Deputy Director of the DOT, unilaterally decided to eliminate the physical location requirement outlined in NRS 453D.210(5) and NAC 453D.265(b)(3). (Vol. 333 JPA 046863)

The DOT then released a revised application on July 30, 2018. (Vol 333 JPA 046839) This revised application was sent to all participants via the DOT's Listserv used by the DOT; however, not all applicants correct emails were included on this list. (Vol 333 JPA 046839). 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 (leading one to believe that the application was in fact the same version). (Vol 333 JPA 046839) The DOT did not make it known on the website that there was a modified application and rather kept the original application on the site. (Vol. 333 JPA 046863)

Despite the statute's physical address requirement, the revised application modified physical address requirements. (Vol. 333 JPA 046863). Specifically, 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)." (Vol. 333 JPA 046863). 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). (Vol. 333 JPA 046863) Otherwise, the applications are virtually identical. Although the amended application changed the language related to a physical address, there was still confusion. (Vol. 333 JPA 046865) For example, on August 22, 2018, attorney Amanda Connor emailed Pupo asking for clarification:

> Jorge –
>
> > I know the regulations make clear that land use or the property will not be considered in the application and having a location secured is not required, but there seems to be some inconsistency in the application. Can you please confirm that a location is not required and documentation about a location will not be considered or no points will be granted for having a location?

Pupo responded approximately two hours later:

> That is correct. If you have a lease or own property than (sic) put those plans. If you dont (sic) then tell us what will the floorplan be like etc etc

Connor then replied less than ten minutes later:

> But a person who has a lease or owns the property will not get more points simply for having the property secured, correct?

To which Pupo wrote back three minutes later:

> Nope. LOCATION IS NOT SCORED DAMN IT!

(Vol. 333 JPA 046865)

While Connor was granted direct information from the DOT Deputy Director Pupo, the DOT otherwise declared it would utilize a "question and answer" process

for the application process through a generic email account at marijuana@tax.state.nv.us to allow applicants to ask questions and receive answers directly from the DOT. (Vol. 333 JPA 046862, 046865)

This directive was in line with the cover letter to the application advising potential applicants of the process for questions:

> Do not call the division seeking application clarification or guidance. Email questions to marijuana@tax.state.nv.us

(Vol. 333 JPA 046862)

Some applicants abided by this procedure; however, the DOT did not post the questions and answers so that all potential applicants would be aware of the process. (Vol. 333 JPA 046862) The DOT made no effort to ensure that the applicants received the same answers regardless of which DOT employee was asked. (Vol. 333 JPA 046862)

Despite the single point of contact process being established, as noted above and throughout the record below, the DOT departed from this procedure. (Vol. 333 JPA 046862-046865, 046867-046868) By allowing certain applicants and their representatives[3] to personally contact the DOT employee about the application

[3] For example, in addition to providing information directly via email, Pupo met with several of the applicants' agent, Amanda Connor, Esq., numerous times in person for meals and Pupo met with representatives of several of the applicants in person during the application process:

process, the DOT violated its own established procedures for the application process. (Vol. 333 JPA 04686)

It is unclear whether Pupo had communications similar to those with Amanda Connor with other potentialapplicants or their agents as Pupo did not preserve the data from his cell phone despite a preservation order being issued on December 13, 2018, and the Attorney General's Office issuing a preservation letter to the DOT. (Vol. 333 JPA 046863) Pupo not only deleted text messages from the phone after the date of the preservation order but also was unable to produce his phone for a forensic examination and extraction of discoverable materials. (Vol. 333 JPA 046853) As a result, the district court imposed an evidentiary sanction that the evidence on Pupo's phone, if produced, would have been adverse to the DOT. (Vol. 333 JPA 046854)

On July 9, 2018 at 4:06 p.m., Amanda Connor sent a text to Pupo:

> List of things for us to talk about when you can call me:
> Attachment E
> Attachment I
> Requirement for a location or physical address Attachment F
> Requirement for initial licensing fee
> Transfers of ownership

(Vol. 333 JPA 046860-046862) Although Pupo tried to direct Amanda Connor to Steve Gilbert, she texted him that she would wait rather than speak to someone else. On the morning of July 11, 2018, Pupo and Amanda Connor spoke for twenty-nine minutes and forty-five seconds. (Vol. 333 JPA 046863)

Applications were accepted from September 7, 2018 through September 20, 2018. (Vol. 333 JPA 046861) By September 20, 2018, the DOT received a total of 462 applications. (Vol. 333 JPA 046865)

Several of the Wrongfully Awarded Licenses were issued to applicants who set forth a mail drop, post office box or UPS location as the proposed physical address for their marijuana dispensary licenses. (Vol. 25 JPA 002751-002754; Vol 29 JPA 003326-003329; 003716-003717; Vol. 36 JPA 004284-004285; Vol 40 JPA 004883; Vol 318 JPA 045099-045115). None of these applicants actually intended to operate a marijuana dispensary out of these various mail drop locations as this was a legal and physical impossibility. *Id.* Thus, the information submitted by these applicants was false or misleading information as they never intended these addresses to in fact be the actual location of their dispensaries (despite setting them forth as such on their applications). *Id.*

Previously, when Appellant THC NV applied for a marijuana distributors license by the DOT it was summarily denied pursuant to NAC 453A.332 (providing false or misleading information). (Vol. 312 JPA 044598-044602; *see also* Trial Exhibit 1259). More specifically, when a Word document was sent to THC NV by the City of North Las Vegas stating that they had approved THC NV's facility for a marijuana license, it was missing the word "distribution". *Id.* As it on a Friday and the City of North Las Vegas was closed, Nick Puliz, the Manager for THC NV, added

the word "distribution" as part of the application. (Vol. 312 JPA 04460). When the City of North Las Vegas was subsequently contacted about it, they did not take any action against THC NV as it was in fact already an approved distribution facility and had inadvertently not included the word "distribution" in the letter. (Vol. 309 JPA 044108; Vol. 312 JPA 044625). In addition to being summarily denied the application for such misstatement, the DOT issued a $10,000.00 fine as well. (Vol. 312 JPA 044600-044601). When Pupo was questioned about this at trial, he confirmed that "Giving false information [on an application] is serious, yes." (Vol. 309 JPA 044108)

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. (Vol. 333 JPA 046866) 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). (Vol. 333 JPA 046867)

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. (Vol. 333 JPA 046867) 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. (Vol. 333 JPA 046867)

The DOT announced the award of conditional licenses in December 2018. (Vol. 333 JPA 046867) Thereafter, many applicants initiated lawsuits to challenge what they believed to be an improper and impartial process undertaken by the DOT in awarding the available licenses. (Vol. 33 JPA 046848-046850) Eventually those lawsuits were consolidated before the Honorable Elizabeth Gonzalez (now retired) in the Eighth Judicial District. (Vol. 333 JPA 046848) A hearing was thereafter held regarding an application for a preliminary injunction that was granted in part. (Vol. 2 JPA 000108-000217; Vol. 10-11 JPA 001134-002333; Vol. 22-25 002345-002822; Vol. 26-31 JPA 002847-003639; Vol. 32-33 JPA 003671-003949; Vol. 34-35 JPA 003968-004227; Vol. 36 JPA 004237-004413; Vol. 37-38 JPA 004426-004500; Vol. 39-41 JPA 004724-005027; Vol. 46 JPA 005469-005492).

The issuance of that preliminary injunction centered around the finding 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. (Vol. 46 JPA 005484)) Instead, the DOT issued conditional licenses to applicants who did not identify each prospective owner, officer, and board member. (Vol. 46 JPA 005484)

The district court determined that DOT took not effort to verify owners, officers or board members in evaluating whether an application was "complete and in compliance." (Vol. 46 JPA 005482) The district court declared 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 percent or greater standard in NAC 453.255(1). (Vol. 46 JPA 005490) 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. (Vol. 46 JPA 005483, 005490)

After the matter proceeded to a bench trial in the summer/early Fall 2020, the district court issued its Findings of Fact, Conclusions of Law and Permanent Injunction declaring that DOT was then permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). (Vol. 333 JPA 046845-046846). However, this was after the district court had already allowed the DOT to unilaterally determine that no applicants were in fact enjoined under the court's ruling. (Vol. 340 App 047863-047882) The court denied all remaining claims for relief by the parties. (Vol. 333 JPA 046845-046846).

SUMMARY OF ARGUMENT

Appellants 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 of Nevada. Respondent, the DOT[4] was the administrative agency responsible for issuing the licenses at the times relevant herein. Some successful applicants for licensure intervened as defendants. Appellants asserted, amongst the various claims at issue, that the DOT failed to follow the law, namely BQ2, as enacted by the voters of Nevada and improperly issued licenses from a severely flawed and impartial system. The district court agreed largely with Appellants' arguments, as clearly set forth in its numerous factual findings in its September 3, 2020, Findings of Fact, Conclusions of Law and Permanent Injunction ("FFCOL"). However, the district court failed to fashion an adequate remedy at law and thus, acted contrary to the substantial evidence and established rules of law; resulting in an abuse of discretion.

ARGUMENT

***Standard of Review**:*

The decision to grant or deny permanent injunctive relief rests in the district court's sound discretion and this Court will not overturn such a decision unless it has been shown to constitute an abuse of discretion. *See Director, Dept. of Prisons v.*

[4] Later substituted by the "Cannabis Compliance Board" pursuant to NRCP 25.

Simmons, 102 Nev. 610, 613, 729 P.2d 499, 502 (1986), overruled on other grounds by *Las Vegas Novelty v. Fernandez,* 106 Nev. 113, 787 P.2d 772 (1990). Nonetheless, if the facts surrounding the underlying issues are undisputed, the district court's decision to grant or deny a permanent injunction will be reviewed de novo. *See Secretary of State v. Give Nevada A Raise,* 120 Nev. 481, 486 n. 8, 96 P.3d 732, 735 n. 8 (2004). Additionally, purely legal questions surrounding the issuance of an injunction are likewise reviewed de novo. *Id.*

Abuse of discretion is defined as a clearly erroneous interpretation or application of the law or an arbitrary or capricious exercise of discretion that is "founded on prejudice or preference rather than on reason" or "contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Ct.*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011). When determining if the district court abused its discretion, this Court examines whether the decision was supported by substantial evidence and guided by applicable legal principles. *Franklin v. Bartsas Realty, Inc.,* 95 Nev. 559, 562–63, 598 P.2d 1147, 1149 (1979). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Stems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

Moreover, issues of statutory and regulatory interpretation are also reviewed de novo. *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 799, 358 P.3d 234, 240 (2015); *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv.*

Employees Union/SEIU Local 1107, AFL-CIO, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008).

I. The Court Should Permanently Enjoin and/or Otherwise Revoke the Issuance of Licenses Who Failed to Provide Complete Applications

a. The Court Should Permanently Enjoin Or Otherwise Revoke the Issuance of Licenses from Applicants who Failed To Identify an Actual Physical Address for a Proposed Retail Recreational Marijuana Establishment Pursuant to NRS 453D.210(5) And In Violation of the Nevada Constitution

This Court should permanently enjoin or otherwise revoke those winning applicants that did not provide an actual physical address for their respective proposed marijuana establishments (e.g., those that listed UPS stores or P.O. boxes or simply provided floor plans) for not complying with the plain and unambiguous language of NRS 453D.210(5)(b) which specifically provides:

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

The plain unambiguous[5] language of NRS 453D.210(5)(b) proscribes that the

[5] When interpreting a statute, courts look first to its plain language. *Arguello v. Sunset Station, Inc*., 127 Nev. 365, 252 P.3d 206 (2011). When a statute is clear on its face, courts give the statute's plain language its ordinary meaning. *Waste Mgmt. of Nevada, Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 170, 443 P.3d 1115, 1117 (2019). The language in NRS 453D.210(5)(b) is language is clear, unequivocal, and unambiguous.

DOT *shall only* approve a completed license application that includes a physical address. The DOT undertook no effort to determine if the applications were in fact "complete and in compliance". (Vol. 333 JPA 046867) Not only was the failure of the address requirement a statutory violation and the BQ2, but the impact of not including the physical address resulted in the inability of the DOT staff to assess certain other application criteria. The district court acknowledged this when it found:

> By selectively eliminating the requirement to disclose an actual physical address for each and every proposed retail recreational marijuana establishment, the D.O.T. 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.

(Vol. 333 JPA 046874)

The evidence before the district court confirmed that several applicants, including but not limited to Integral Associates LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana LLC, Essence Henderson, Nevada Organic Remedies, Henderson Organic Remedies, and CPCM Holdings, LLC d/b/a Thrive Cannabis Marketplace applications failed to identify an actual physical address for their proposed retail recreational marijuana establishments, yet did nothing to actually hold the DOT (and the winning applicants who failed to comply with this statutory requirement) responsible for this failure. (Vol. 25 JPA 002751-002754; Vol 29 JPA 003326-003329; 003716-003717; Vol. 36 JPA 004284-004285; Vol 40 JPA 004883;

Vol 318 JPA 045099-045115) Physical identification of a location (and not a P.O. Box) was required by NRS 453D.210(5)(b), NAC 453D.265(1)(b), and NAC 453D.268. It is undisputed the DOT improperly issued conditional licenses to applicants who did not disclose in their application an actual physical address for proposed retail recreational marijuana establishment but there were absolutely no repercussions for this failure to follow the law.

The Nevada Supreme Court has recognized that:

> Initiative 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).

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. 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.

An agency's action in interpreting and executing a statute it is tasked with interpreting is entitled to deference "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *Nuleaf CLV Dispensary, LLC v. State Dept. of Health and Human Services*, *Div. of Pub. and Behavioral Health*, 414 P.3d 305, 308 (Nev. 2018) (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006))

By selectively eliminating the requirement to disclose an actual physical address this was not just a technical oversight, it had significant and substantive impacts in the grading as it the DOT limited the ability of the Independent Contractors 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. While the necessary result in revoking those licenses that did not provide a physical address is challenging, it must ordered if there is to be respect for application of our laws and entrusting the State to follow fair processes. To allow the DOT to blatantly disregard the law – as enacted under a ballot initiative protected under our Nevada Constitution - is to undercut the integrity of our entire systems of laws and order. The highest public interest is to assure that government agencies do not take actions inconsistent with voter approved initiatives and/or act arbitrarily and capriciously when they

establish procedures that impact protectable property rights.

"A decision that lacks support in the form of substantial evidence is arbitrary or capricious" and, therefore, an abuse of discretion. *Tighe v. Las Vegas Metro. Police Dep't,* 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994); *see also* NRS 233B.135(3). "Substantial evidence" is "that which "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting *Edison Co. v. Labor Board,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). Here there is no substantial evidence to support the processing of an incomplete application (i.e., no physical address) in direct contravention of the law. Thus, to sanction the processing of those incomplete applications is an abuse of discretion.

The purpose of state controlled competitive bidding and competitive application processes is "to secure competition, save public funds, and to guard against favoritism, improvidence, and corruption." *Gulf Oil Corp. v. Clark Cty*., 94 Nev. 116, 118-19, 575 P.2d 1332, 1333 (1978)**Error! Bookmark not defined.**; see also *City of Boulder City v. Boulder Excavating, Inc*., 124 Nev. 749, 758, 191 P.3d 1175, 1181 (2008). The statutes and regulations that govern competitive bidding and application processes are "for the benefit of the taxpayers" and should "be construed for the public good." *Gulf Oil,* 94 Nev. at 118-19*; Richardson Constr. v. Clark Cty.*

Sch. Dist., 123 Nev. 61, 66, 156 P.3d 21, 24 (2007). If there is no trust in the fairness and equal treatment in the competitive bidding system, there is no trust in our government.

As set forth above, some applicants were made aware of the physical location change between the July 6, 2018 application and the July 30, 2018 application but the change itself was clearly not publicized by the DOT. (Vol 333 JPA 046839). As a result, providing only some participants pertinent application information that is not available to all, demonstrates favoritism and deprives all applicants of the same opportunity and defeats the purpose and integrity of the competitive bidding process. *Id*.; *see also Spiniello Const. Co. v. Town of Manchest*er, 189 Conn. 539, 544, 456 A.2d 1199, 1202 (1983). "An awarding board has a duty to reject any bid materially varying from bid specifications." *Faust v. Donrey Media Grp*., 95 Nev. 235, 237, 591 P.2d 1152, 1154 (1979). This "preserve[s] the competitive nature of bidding by preventing unfair advantage to any bidder, or other conditions undermining the necessary common standard of competition," "save public funds and guard against favoritism, improvidence and corruption." *Id*. at 238 n.1; *Richardson*, 123 Nev. at 66, 156 P.3d, at 24.

In this case, NRS 453D permitted the DOT to approve ***only*** complete license applications, which expressly required providing a physical location. NRS 453D.200(2), NRS 210(4)-(5). The Department was also required to "use an impartial

and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." NRS 453D.210(6). As such, the physical location requirement was an express part of BQ2 and the scoring and impartial competitive bidding processes. Moreover, the requirements of BQ2 could not be amended in any way for three years without a vote by the people.

Notwithstanding the foregoing, the DOT unilaterally changed the physical location requirement and shared the change with only some applicants. By doing so, the DOT demonstrated favoritism, undermined the purpose and integrity of the competitive bidding process, and, most importantly, violated the Nevada Constitution. Such a result cannot be sanctioned by the State's highest court.

b. While the Court Permanently Enjoined the State From Conducting a Final Inspection of Any Conditional Licenses Issued in December 2018 For Applicants Who Did Not Provide the Identification of Each Prospective Owner, Officer, and Board Member As Required by NRS 453D.200(6), The District Court Impermissibly Allowed the State Full Authority to Nullify this Permanent Injunction

The district court correctly acknowledged that the DOT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5 percent prior to award of a conditional license was 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). Thus, the Court concluded: "The State is permanently enjoined from conducting a final inspection of any of the

conditional licenses issued in or about December 2018 for an applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6)." (Vol. 333 JPA 046845-046846). However, the district court thereafter allowed DOT to singularly determine who was enjoined because the DOT was the entity in possession of the complete applications. (Vol. 340 App 047863-047882) ("Because the Court did not have unredacted versions of the application for all applicants, it was impossible and remains impossible for the Court to make a determination, which is why I have asked the Department of Taxation to make the determination, since that's within their records.") (Vol. 46 JPA 005547)

The DOT certification was attached as Court Exhibit 3 to the district court's order granting a preliminary injunction and was admitted as Trial Exhibit 1302 in Phase II of the trial. (Vol. 330 JPA at 046446-046448) In this certification, the DOT identified three tiers of applicants to the District Court with the third tier being applicants for which the DOT could not eliminate a question as the completeness of the applications. *Id.* At a hearing on August 29, 2019, the District Court considered the DOT certification and stated as follows:

> Those who are in the third category will be subject to the injunctive relief which is described on page 24 the findings of fact and conclusions of law. Those who are in the first and second category will be excluded from that relief.

(Vol. 46 JPA 005548)

Four applicants were listed in Tier 3 of Court Exhibit 3 as follows: Helping Hands Wellness Center, Inc., Lone Mountain Partners, LLC, Nevada Organic Remedies, LLC and Greenmart of Nevada NLV, LLC. (Vol. 330 at 046446-046448) And yet this specific injunctive language was undercut by the subsequent actions taken by the DOT and sanctioned by the district court.

On August 11, 2020, DOT filed a "Notice of Removing Entities from Tier 3" (herein after "Tier Notice"). (Vol. 320 JPA 045317-045332) Appellants moved to Strike the Tier Notice and/or otherwise modify the district court's FFCOL on the basis that the DOT, without any court authority, redistributed the classifications of application status in order to improperly redistribute the privileged marijuana dispensary licenses from certain intervenors to certain plaintiffs in support of a partial settlement agreement amongst those parties and the DOT (hereinafter "Partial Settlement"). (Vol. 326 JPA 045906-045917; Vo; 342 JPA048092-048127). Specifically, that Partial Settlement Agreement sets forth certain terms by which the DOT agreed to commit itself, as well as its successor in interest, the Cannabis Compliance Board ("CCB") to various conditions precedent, including the redistribution of licenses. (Vol. 342 JPA 048108-048127) One of those material conditions precedent requires the DOT to file a motion before this Court requesting a reclassification of tiers as it relates to completeness or lack thereof of dispensary applications submitted to the DOT in September 2018 which was in accordance with

the district court's prior ruling on the matter. (Vol. 342 JPA 048110-048111; Vol. 326 JPA 045915)

The Tier Notice solely served to fulfill the settling parties' efforts to circumvent the district court's ultimate FFCOL and order granting in part Nevada Wellness Center, LLC's Motion for Summary Judgment on First Claim for Relief confirming that the preliminary injunction had become permanent to the extent the court confirmed the DOT acted beyond the scope of its authority by replacing the requirement for a background check of each prospective owner with the 5% or greater standard in NAC 453D.255(1). (Vol. 326 JPA 045900-045905)

The DOT submitted no evidence to support a determination that these previously enjoined applications had in fact provided all of the information required regarding its owners; rather, the DOT unilaterally determined that no evidence had been provided to answer the DOT's prior unresolved inquiries for two of the applicants and that the legislature had since changed the regulations solely allowing the CCB (the DOT's predecessor in interest) to determine if the "person is qualified to receive a license . . ." and the CCB had made such a determination for the other two applicants. (Vol. 320 JPA 045317-045332).

This completely transparent, self-serving Tier Notice is in blatant disregard of the law in place at the time of the September 2018 applications and the district court's sanctioning of it is arbitrary and capricious as it is a complete disregard of the Nevada

Constitution (as well as the record below), resulting in an abuse of discretion.

DOT promulgated and implemented regulations which gave it the authority to only background check owners who held more than a 5% interest in the applying company. NAC 453D.255(1). No amount of backpedaling, contortion of language, or circular argumentation can refute the fact that the DOT has directly eschewed a mandatory statutory obligation to background check all owners by passing this regulation. If this Court were to allow such a deviation from the language of the enabling statute, then it would, in essence, be condoning the modification of a ballot question in violation of Article 19, Section 2, clause 3 of the Nevada Constitution.

"A decision that lacks support in the form of substantial evidence is arbitrary or capricious" and, therefore, an abuse of discretion. *Tighe v. Las Vegas Metro. Police Dep't,* 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994); *see also* NRS 233B.135(3). "Substantial evidence" is "that which "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting *Edison Co. v. Labor Board,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938))

As result of the foregoing, the district court's ultimate FFCOL failed to fashion a remedy consistent with its factual findings. Essentially, the district court's rulings were that the entire 2018 recreational dispensary application process was

unfair; improper violation of a ballot initiative in violation of Article 19, Section 2(3) of the Nevada Constitution was arbitrary and capricious and in violation of its own established procedures, and yet there was absolutely no adequate relief provided. No winning applicant was enjoined from proceeding with enjoying the coveted licenses awarded from this grossly flawed process; no losing applicant was provided any compensation in any form whatsoever. In short the permanent injunction was hollow and failed to provide any actual remedy consistent with its factual findings – and so it would remain that the DOT would be allowed to continue, as it had before, to do whatever it deemed necessary to put this mess behind it.

The public's interest in fairness and transparency outweighs that of the DOT's haphazard and non-law-abiding process for awarding recreational dispensary licenses. *In re Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC*, 465 N.J. Super. 343 (N.J. Super. 2020) A.3d 688 (Decided Nov 25, 2020). In this, the New Jersey Court vacated the agency action in awarding the licenses and remanded to the Department of Health requiring it to develop a further record to explain its actions based upon the public's interest in a fair, competitive, and trustworthy selection process.

> We intervene in the administrative proceedings that have taken place so far to ensure the public's confidence in both the results achieved at the agency level so far and to ensure that future

> similar proceedings will be likewise subjected to a measure of scrutiny at the agency level that will guarantee the process does not produce determinations that are arbitrary, capricious or unreasonable. We so hold not because it betters our ability to review the agency decisions but because of the overriding public interest. As we have said before in bidding matters, '[b]oth the public interest and the public's perception' that the process is 'fair, competitive and trustworthy are critical components and objectives' *Muirfield Constr. Co. v. Essex Cty. Improvement Auth.*, 336 N.J. Super. 126, 137-38, 763 A.2d 1272 (JPA Div. 2000).

Id.

Likewise, this Court should also intervene to ensure the public's confidence in both the results achieved at the State level and to ensure that future similar proceedings will be likewise subjected to a measure of scrutiny at the agency level that will guarantee the process does not produce determinations that are arbitrary, capricious, or unreasonable. As such, it must overturn the DOT's actions of improperly awarding the coveted dispensary licenses through a grossly flawed and inconsistent process as the district court abused its discretion when it simultaneously acknowledged the completely flawed application process and yet provided no adequate remedy for the same.

II. THC NEVADA, LLC Was Deprived Of Equal Protection Under the Law As its Marijuana Distribution Application Was Summarily Denied For Misinformation and Issued a $10,000.00 Fine but When Other Applicants Provided Misinformation on Their Marijuana Dispensary Applications, They Were Awarded a Coveted License

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination." *Sioux City Bridge Co. v. Dakota Cty*., 260 U.S. 441, 445 (1923). The Nevada Constitution also demands equal protection of the laws under Article 4, Section 21 of the Nevada Constitution. *Doe v. State*, 133 Nev. 763, 767, 406 P.3d 482, 486 (2017).

If a suspect class or fundamental right is not implicated, then the law or regulation promulgated by the state will be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). When the state or federal government arbitrarily and irrationally treats groups of citizens differently, such unequal treatment runs afoul the Equal Protection Clause. *Engquist v. Oregon Dep't of Agr*., 553 U.S. 591, 601 (2008). Where an individual or group were treated differently but are not associated with any distinct class, Plaintiffs must show that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In the case of THC NV, it was intentionally treated differently from others similarly situated by the DOT in regard to its application for a marijuana license without any rational basis for the difference in treatment. Unambiguously, NAC 453.312 **requires** the DOT to deny an application for issuance of a license if any owner, officer, or board member provides false or misleading information to the Department. The record below shows that several of the Wrongfully Awarded Licenses were issued to applicants who set forth a mail drop, post office box or UPS location as the proposed physical address for their marijuana dispensary licenses. (Vol. 25 JPA 002751-002754; Vol 29 JPA 003326-003329; 003716-003717; Vol. 36 JPA 004284-004285; Vol 40 JPA 004883; Vol 318 JPA 045098-045115). None of these applicants actually intended to operate a marijuana dispensary out of these various mail drop locations as this was a legal and physical impossibility. *Id.* Thus, the information submitted by these applicants was false or misleading information as they never intended these addresses to in fact be the actual location of their dispensaries (despite setting them forth as such on their applications). *Id.* And yet, in contravention of NAC 453D.312 **requiring** the DOT to deny an application for issuance of a license if any owner, officer, or board member provides false or misleading information to the Department, the DOT awarded several licenses based on these false and misleading applications.

Conversely, Appellant THC NV was summarily denied its marijuana distributors license by the DOT when it prematurely represented that the City of North Las Vegas had confirmed the proper zoning for its distributors license application. (Vol. 312 JPA 044598-044602; *see also* Trial Exhibit 1259). More specifically, when a Word document was sent to THC NV by the City of North Las Vegas stating that they had approved THC NV's facility for a marijuana license, it was missing the word "distribution". *Id.* As it on a Friday and the City of North Las Vegas was closed, Nick Puliz, the Manager for THC NV, added the word "distribution". (Vol. 312 JPA 04460). When the City of North Las Vegas was subsequently contacted about it, they did not take any action against THC NV as it was in fact already an approved distribution facility and had inadvertently not included the word "distribution" in the letter). (Vol. 309 JPA 044108; Vol. 312 JPA 044625). In addition to being summarily denied the application for such misstatement, the DOT issued a $10,000.00 fine as well. (Vol. 312 JPA 044600-044601). When DOT Deputy Director Pupo was questioned about this at trial, he confirmed that "Giving false information [on an application] is serious, yes." (Vol. 309 JPA 044108) But there was no testimony or evidence to explain how providing false or misleading addresses as a post office box was any different.

THC NV, having spent over $250,000.00 in preparing its dispensary application that it submitted for three jurisdictions, was intentionally treated differently than that

of the other similarly situated license applicants who misrepresented and provided false information about their locations. (Vol. 312 JPA 044594; 044609). The DOT provided no rational basis for this difference in treatment.

As Pupo, the Deputy Director of the DOT stated, "giving false information" on a marijuana application is serious; so serious in fact that THC NV was not only summarily denied its application for a distribution license because of it but was fined $10,000.00. This is in line with the repercussions provided for in NAC 453D.312 (which **requires** the DOT to deny an application for issuance of a license if any owner, officer, or board member provides false or misleading information to the Department) And yet, several Wrongfully Awarded Licenses clearly gave false information about their locations on their dispensary applications and were awarded licenses. There is no rational basis for this grave disparate treatment under the mandatory directive of the DOT's own regulations. Therefore, THC NV was denied equal protection under the law and all those applicants that misstated their location (or any other false or misleading information, such as inaccurate board, officer, or owner information) should be revoked and THC NV should be awarded damages in the amount of $250,000.00.

CONCLUSION

Appellants have a statutory right to an impartial and fair competitive bidding process by which the licenses are awarded. This competitive bidding process was sullied by the DOT's abrogation of NRS Chapter 453D's provisions. This resulted in some applicants being awarded licenses that they were not entitled to, and in some entities being denied licenses that they should have been awarded. Thus, this injury is directly related and arising out of the DOT's passage of regulations that directly contravene the enabling statute as well as the DOT's failure to act uniformly with all the applicants. The public entrusts its government that it will follow and act in compliance with the law and most importantly the voters' ballot initiatives. While correcting the manifest errors in the process is not ideal or practical given the way in which the winning applicants were allowed to proceed, this should not stand in the way of justice being served. The trust of the people of Nevada lies in the system of checks and balances by which the Court will hold the legislative and executive branches accountable. Without the ability to protect and uphold our State's laws, there can be no public confidence in our government.

CERTIFICATE OF COMPLIANCE

a. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in aproportionally spaced typeface using Microsoft Word for Mac Version 16.10 in 14-point Times New Roman font.

b. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 14,000 words.

c. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requiresevery assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix wherethe matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of December, 2021

SIGAL CHATTAH, ESQ

/s/ Sigal Chattah
Sigal Chattah
Nevada Bar No. 8264
5875 S. Rainbow Blvd #203
Las Vegas, NV 89118
Attorney for Plaintiff
Herbal Choice, Inc.

AMY L. SUGDEN, ESQ.

/s/ Amy L. Sugden
Amy L. Sugden
Nevada Bar No 9983
9728 Gilespie Street
Las Vegas, NV 89183
Attorney for Plaintiff
THC Nevada, LLC

CERTIFICATE OF SERVICE

The undersigned, an employee of SUGDEN LAW, hereby certified that on the 22ND day of December, 2021, she served a true and correct copy of the foregoing, **APPELLANTS THC NEVADA, LLC AND HERBAL CHOICE, INC.'S' OPENING BRIEF**, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: December 22, 2021

/s/ *Amy L. Sugden*
Attorney