Case No. 82014

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T LITIGATION; TGIG, LLC; NEVADA HOLISTIC 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 FAMRS HOLDINGS, LLC,

Appellants,

v.

THE STATE OF NEVADA EX REL.
ITS DEPARTMENT OF TAXATION,

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. A-19-786962-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-C

RESPONDENT'S THE STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION AND THE CANNABIS COMPLIANCE BOARD'S ANSWERING BRIEF TO THE RESPECTIVE OPENINING BRIEFS OF HERBAL CHOICE, INC., THC NEVADA, LLC, NEVCANN, LLC GREEN THERAPEUTICS, LLC, RED EARTH, LLC, AND GREEN LEAF FARMS HOLDINGS, LLC

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I. INTRODUCTION

The voters entrusted the Department of Taxation ("Department") with launching legal retail marijuana in Nevada. And that is just what the Department and the later created Cannabis Compliance Board did. Retail marijuana has been a startling success. For example, in fiscal year 2021, taxable sales of legal marijuana exceeded $1 billion.[1] Because it was vital that legalization of retail marijuana help fund public education, legalization has created a windfall for our schools. In fiscal year 2021 alone, the Distributive Schools Account received $159 million.[2]

Appellants[3] are a set of disappointed applicants from the 2018 retail marijuana competition. Appellants cite no evidence that the Department, or any of the Appellants' competitors, acted wrongfully to deprive them of a retail marijuana license, nor do they argue that, had the Department

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[1] https://ccb/nv.gov/ccb-dot-release-annual-cannabis-taxable-sales-data-gy21/.

[2] *Id*.

[3] "Appellants" refers to Herbal Choice, Inc., THC Nevada, LLC, Green Therapeutics, LLC, Red Earth, LLC, Green Leaf Farms Holdings, LLC, and NevCann, LLC. Herbal Choice, Inc. and THC Nevada, LLC filed a brief separate from the other Appellants. For ease of reference, Respondents cites to the separate briefs as "Herbal Br." and "NevCann Br."

governed the 2018 retail dispensary competition as they suggest, Appellants would have received a license. In fact, they completely ignore the legions of higher scoring, but still unsuccessful competitors, with no connection to Appellants' allegations of wrongdoing that fill the expanse between Appellants and retail licensure. Appellants seek either to harm their successful competitors or void the entire 2018 retail marijuana competition, not because of any concrete, redressable injury but to "instill[] actual confidence in our state government." Herbal Br. 5. This Court's entrenched justiciability caselaw forecloses their quest to evaluate a generalized grievance into a case.

Contrary to Appellants' repeatedly portrayal, the Department kept faith with its statutory obligation to provide an impartial and numeric ranking system for the 2018 retail marijuana competition. To be sure, the district court roundly criticized the Department, but the district court correctly determined that it acted within its broad scope of regulatory authority. And even if it did not, no error made any difference to Appellants' unsuccessful outcome. In sum, whatever errors in the 2018 retail marijuana competition occurred, no Appellant presented evidence that they were deprived of a dispensary license because of them.

Because Appellants' eyes are firmly focused on the past, they ignore that the background check statute (NRS 453D.200(6)) and accompanying regulation (NAC 453D.255) that were the basis of the declaratory and injunctive relief order (333 JPA 046876) were repealed in June 2020. Well-established jurisprudence compels the conclusion any constitutional question as to NAC 453D.255's constitutionality is moot. Nothing can resurrect those provisions. Nevada law has moved on by creating Title 56 of the Nevada Revised Statutes, the Cannabis Compliance Board, and the Cannabis Compliance Board's implementing regulations.

If the legislature in the future allocates more retail dispensary licenses, then Appellants are free to seek them. But this Court's caselaw prevents Appellants from using the courts to harm their competitors who were more successful than they were in the last round. This Court should dismiss Appellants' appeal, or alternatively, leave the district court's order in place as there is no basis to strip any successful licensee of their license that they won fair and square.

II. STATEMENT OF JURISDICTION

The Court lacks appellate and subject matter jurisdiction. First, there is no final order in this phased litigation. Second, Appellants never dismissed their mandamus claim, and the district court did not adjudicate it either. Third, the appeal is also not justiciable because regardless of the appeal's outcome, Appellants will not receive a retail marijuana dispensary license. Fourth, the statute and regulation at the heart of the district court's order, NRS 453D.200(6) and NAC 453D.255(1) were repealed. No authority permits a plaintiff to seek prospective relief regarding a repealed statute.

III. STATEMENT OF THE ISSUES

1. Whether the district court's holding that NAC 453D.255(1) was an unconstitutional annulment of NRS 453D.200(6) is rendered moot by the repeal of both the statute and the regulation?

2. Whether the district court correctly held that none of the Appellants' other laundry list of gripes regarding the 2018 retail marijuana competition supported the elements of the causes they actually pled in their operative complaint?

3. Whether Appellants have standing to seek further injunctive relief to strip current successful applicants of their retail licensure?

4. Whether the district court correctly held that the balance of equities did not favor Appellants sufficiently to warrant further equitable relief?

5. Whether the public interest supports denying Appellants' request for further equitable relief?

IV. STATEMENT OF THE CASE

A. Legal background

Nevada's legalization of recreational marijuana was a multi-step process. Nevadans first approved the legalization of marijuana for medical use, which resulted in Chapter 453A of the Nevada Revised Statutes. Several years later, Nevadans approved recreational marijuana, which resulted in Chapter 453D of the NRS.

1. Medical marijuana licensure

The voters amended Nevada's Constitution to allow for the possession and use of marijuana to treat various medical conditions. *See* Nev. Const. art. 4, § 38(1)(a). But they left it to the Legislature to create

laws "[a]uthoriz[ing] appropriate methods for supply of the plant to patients authorized to use it." Nev. Const. art. 4, § 38(1)(e).

This Court recognized this deference in *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 414 P.3d 305 (2018). In *Nuleaf*, the issue was applicant eligibility absent compliance with local government zoning prior to licensure. *Nuleaf*, 134 Nev. at 130, 414 P.3d at 306. In affirming DPBH's discretion to consider the applicant, the court reasoned that (i) license certificates were "provisional" until final licensure and (ii) though NRS 453A.322(3)(a) required DPBH to register medical marijuana establishments meeting that subsections' zoning requirements, nothing prohibited DPBH from considering applicants lacking zoning approval.

2. Retail marijuana licensure

(a) Statutory background

Three years later, the voters passed The Regulation and Taxation of Marijuana Act in 2016, which is also known as Ballot Question 2. *See* NRS 453D.010. This was the final step in the long march toward legalization of retail marijuana.

The voters' policy reasons were expressed in NRS 453D.020. Local and state law enforcement could better focus their energies on property and violent crime. NRS 453D.020(1). Cultivation and sale proceeds should not line criminal's pockets but fund public education. NRS 453D.020(2). Accordingly, the voters reasoned, marijuana should be regulated similar to other legal businesses, for example, like alcohol. NRS 453D.020(1) and (3).

Like medical marijuana's roll out, Question 2 deferred to the licensing authority to implement the voters' will. The Department should adopt all "necessary and convenient" regulations. NRS 453D.200(1).

The process of creating licensure was left to the Department's discretion. Nevada law provides that the Department should create "[p]rocedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment." NRS 453D.200(1)(a). Similar to the process for licensure for medical marijuana, dispensary licenses were conditional for one year. JPA 333 at 046873, ¶99.

Pertinent here, Chapter 453D contained a provision that is nearly identical to the law analyzed in *Nuleaf*. NRS 453D.210(5) provides the "[Department] shall approve a license application if" (i) the application is

"in compliance" with the Department's regulations and the application fee is paid, (ii) the applicant owns, or has the written permission of the owner, the dispensary's location, (iii) the dispensary's location meets distancing requirements from schools, community centers, and gaming establishments, (iv) approval does not offend numeric limits for licenses in the jurisdiction, (v) the local zoning officials do not affirm that the dispensary's location offends their zoning rules, an d (vi) certain officials within the dispensary meet eligibility requirements. NRS 453D.210(5)(a)-(f).

The qualifications for licensure were also largely left to the Department's discretion. Ranking must be through "an impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." NRS 453D.210(6). Qualifications must be "directly and demonstrably related to the operation of a marijuana establishment." NRS 453D.200(1)(b).

Nevada law gave the Department great flexibility to aid with starting the retail marijuana industry from scratch. Under Nevada law, the Department was to issue the "appropriate license" in 90 days from

receiving "a complete marijuana application." NRS 453D.210(4)(a). Nevada law did not define the phrases "appropriate license" or "complete marijuana application." *Id*.

A provision of Question 2 contained a section on background checks, "[t]he Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6). Nowhere in Question 2 is owner, prospective, or license applicant defined.

In July 2020, the power to regulate marijuana shifted to the Cannabis Compliance Board under a set of new laws called Title 56. *See* NRS 678A-D. Measures were created to protect the public health, safety, and morals in the nascent cannabis industry in Nevada. Nevada's legislature adopted general qualifications for licensure and registration of persons. NRS 678B.200. It is up to the CCB to determine if the "person is qualified to receive a license…" NRS 678B.200(1). The legislature then set out three categories of considerations for the CCB to consider when evaluating an applicant's application to receive a license. NRS 678B.200(2)(a)-(c). These categories include "good character," "prior

activities," and a catch-all category to determine that the applicant is qualified "in all other respects." *Id.*

Nevada's legislature left it to the CCB to define the term "person." The CCB has defined a "person" to include, "natural persons, applicant, limited partnerships, limited-liability companies, corporations, publicly-traded corporations, private investment companies, trusts, holding company, or other form of business organization such as defined by the Board." CCB Reg. 1.137. Applying for licensure "constitute[s] a request to the Board for a decision upon the applicant's general suitability, character, integrity, and ability to participate or engage in or be associated with, the cannabis industry in the manner or position sought by the application…" CCB Reg. 5.000(3). The CCB is also authorized to consider applicant's suitability and qualifications. CCB Reg. 5.015.

Appellants' lawsuit raised a concern about background checks of minority shareholders of corporate entities. Nevada's legislature also addressed this concern with the authorization of a waiver process in defined circumstances. NRS 678A.450(1)(e). The CCB fully addressed and adopted the waiver process authorized by statute. CCB Reg. 5.125.

Accordingly, after July 1, 2020, NRS 453D.200(6) was repealed. 2019 Statutes of Nevada, page 3896.

(b) Governor's Task Force and Early Start Program

To get the ball rolling with retail marijuana, two initial steps were taken by Nevada officials. First, Governor Sandoval convened The Governor's Task Force (**Task Force**). Vol. 333, JPA 046856, ¶9. Second, the Department began the Early Start Program (**Early Start**). *Id*. at ¶10.

The Task Force was to "identify the legal, policy, and procedural issues that need to be resolved to offer suggestions and proposals for legislative, regulatory, and executive actions that need to be taken for the effective and efficient implementation of [Question 2]." DOT000498. The Task Force recommended that the state decides the "who" question as to who gets licenses and the local government decides the "where" question, because the State does not have a say in where the store goes. 283 JPA 40888-40890.

Early Start was administered by temporary regulations, (Vol. 333, JPA 046856, ¶10), but later by NAC 453D.265. Under Early Start, medical marijuana license holders (whether the license was for cultivation, distribution, product manufacturing, or dispensary) could

apply for and receive license of the same type. NAC 453D.265(1)-(2). The Department would then issue a license of the same type upon receipt of the application and the required fees. NAC 453D.265(2).

(c) Regulatory background

After robust debate in the administrative process and within the Task Force, the Department promulgated regulations to administer Question 2. As stated above, the implementation of Question 2 occurred in two phases: Early Start and the later retail marijuana licensing competition.

The application process for the retail dispensary competition was administered by NAC 453D.268. To that end, NAC 453D.268(1)-(10) described the inputs that the application was to include along with a $5,000 application fee. Ranking competitors were governed by NAC 453D.272. If two applications were received for the same jurisdiction, the applications were evaluated on the regulation's enumerated criteria and "[a]ny other criteria the Department determines to be relevant[,] and compliance with NRS 453D and NAC 453D. *See* NAC 453D.272(1)(a)-(i).

The Nevada Tax Commission promulgated regulations in February 2018. Relevant here was NAC 453D.255 (1). This regulation provides:

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

NAC 453D.255(1). The regulations expressly provided the Department with the discretion to apply provisions concerning owners to persons owning less than 5% if the public interest would be served thereby. NAC 453D.255(2). With the transfer of power to the Cannabis Compliance Board in July 2020, this regulation is no longer in effect. The CCB promulgated its own regulations to implement Title 56.[4]

B. Factual background

The October 2018 retail marijuana dispensary competition was necessarily highly competitive. The fierce competition resulted from the limited number of licenses that were allocable. Only 64 retail marijuana store licenses were available in Nevada. RA 409-10 (Tr. Ex. 1007). For example, 6 retail store licenses were available in Henderson, 10 in Las Vegas; 10 in unincorporated Clark County, and 5 in North Las Vegas. *Id.*

[4] https://ccb.nv.gov/wp-content/uploads/2021/12/TOC-Effective-NCCR-as-of-March-2021_v111521.pdf. The CCB's regulations were initially adopted on August 5, 2020. *Id.*

Appellants competed in the October 2018 retail dispensary competition. Vol. 333, 46853. They were not successful. *Id.* In fact, they were not close.

The results from two jurisdictions, the City of Las Vegas and North Las Vegas, illustrate the point:

Clark County- Las Vegas

Rank	Appellants	License awarded yes/no
1-10		Yes
11-24		No
25	Red Earth	No
26-34		No
35	Green Therapeutics	No
36-54		No
55	Nevada Holistic Medicine	No
58	THC Nevada	No
59-78		No
79	NevCann	No
81	Green Leaf	No
85	Herbal Choice	No

Clark County-North Las Vegas

Rank	Appellant	License awarded yes/no
1-5		Yes
6-21		No
22	Red Earth	No
23-32		No
33	Green Therapeutics	No
34-45		No
46	THC Nevada	No
47-57		No
58	NevCann	No
63	Herbal Choice	No
67	Green Leaf	No

RA 402-04.

V. PROCEEDINGS BELOW

After receiving written notice that they lost, Appellants sued. Appellants alleged that their failure to win licenses was caused by violations of substantive due process, procedural due process, and equal protection of the laws. RA 263. Though styled as separate causes of action, Appellants sought remedies of judicial review, declaratory relief, injunctive relief, and mandamus. *Id*. Appellants sought a temporary restraining order and preliminary injunction.

A. Preliminary injunction hearing

The district court held a 20-day preliminary injunction hearing. *See generally* Vol. 10-20, 22-25, 26-31, 32-33, 34-35, 37-38, 39-41, and 42-45 of the JPA. Following the hearing, the district court granted a preliminary injunction against the Department. 46 JPA 005469.

In its findings of fact and conclusions of law, the district court ruled on NAC 453D.255(1)'s validity. *Id*. at 005490, ¶85. The district court held that to the extent NAC 453D.255(1) excused the Department from conducting a background check on owners of a retail dispensary applicant, it was an unconstitutional annulment of the ballot initiative,

Question 2. *Id*. The district court, without describing any applicant, enjoined the Department from conducting a final inspection of conditional licenses that failed to disclose all of their owners, officers, and board members in the 2018 retail marijuana competition. *Id*. at 005492.

After extensive discovery (280 JPA 40324 – 329 JPA 46355), a 20-day bench trial and a 1-day hearing on judicial review ensued.

B. Bench trial

The bench trial for Phase 2 included all claims involving the "legality" of the 2018 application process. 333 JPA 46848 (fn. 1). In addition to the Department, the Appellants sued several successful applicants such as Cheyenne Medical, LLC, Circle S Farms, LLC, Clear River, LLC, Commerce Park Medical, LLC, Deep Roots Medical, LLC, Essence Henderson, LLC, Essence Tropicana, LLC, among others. RA 267, ¶32. Appellants pointed to no evidence demonstrating that these entities did anything inappropriate or wrongful during the application and licensing process.

Though the district court found flaws in how the Department conducted the competition, none mattered to the competition's outcome. 333 JPA 046869, ¶75. THC Nevada, LLC's testimony shows why.

Prior to the application process, THC offered jobs to Jorge Pupo and a number of Department employees. 311 JPA at 313-316. THC included a physical address in its application even though it did not own it or have the owner's written permission to use the land for a retail marijuana dispensary. 314 JPA 5-6. During the application process, THC and its attorney were able to contact the Department for answers to their questions. 314 JPA at 7-8 and 58. THC also received the Department's listserv. 314 JPA at 23. THC received the Department's revised application and used it. 314 JPA at 91.

Despite taking part in virtually all the alleged misconduct THC accused others of doing, it did not receive a license. It was ranked 46th in North Las Vegas; only the top 5 ranks received licenses. RA 402-04. THC finally testified that it had no information that anyone at the Department engaged in improper behavior during the application and licensing process. 314 JPA at 65 and 77.

Appellants also relied on an expert, Greg Smith, to substantiate their argument that the Department's lack of a single point of contact made the application process unfair and that some applicants received preferential information. 311 JPA 044477-78. Unwittingly, on cross-

examination, Mr. Smith confirmed that the 2018 retail marijuana application was fair, as the ultimate insider, TGIG, LLC had the same information that supposedly was closeted with select winning applicants but lost. *Compare* 312 JPA 44519-20 and 333 JPA 046870 ¶75 n.29.

After reviewing the evidence and listening to closing arguments of counsel, the district court issued its findings of fact and conclusions of law. 333 JPA 46848. The district court reasoned that Appellants' damages were too speculative to be awarded. 333 JPA 46876. The district court denied all of Appellants' claims except equal protection. *Id*. Because the district court had already held that NAC 453D.255(1) was unconstitutional, it made its preliminary injunction permanent. *Id*.

C. Judicial review

The district court denied Appellants' petitions for judicial review "in its entirety." 333 JPA 46833, 46844. Appellants do not challenge the district court's order denying judicial review in their briefs.

VI. STANDARD OF REVIEW

This Court reviews a district court's decision to grant a permanent injunction for an abuse of discretion. *Commission on Ethics v. Hardy,* 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009). "Broadly speaking, an

injunction may issue to restrain a wrongful act that gives rise to a cause of action." *Chateau Vegas Wine, Inc. v. Southern Wine and Spirits of America, Inc.*, 127 Nev. 818, 265 P.3d 680 (2011) (citing *State Farm Mut. Auto. Ins. v. Jafbros Inc.,* 109 Nev. 926, 928, 860 P.2d 176, 178 (1993)).

"[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette–Journal* 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). A district court's fact finding receives deference unless they are "clearly erroneous and not based on substantial evidence." *Beverly Enterprises v. Globe Land Corp.,* 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974).

Finally, legal interpretation rules for statutes are equally applicable to regulations. *Silver State Elec. Supply Co. v. State of Nev. ex rel. Dep't of Taxation*, 123 Nev. 80, 157 P.3d 710 (2007). Regulations are presumed constitutional. *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (statutes are presumed constitutional). The party challenging the enactment has the burden to demonstrate a "clear showing of invalidity." *Id*.

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VII. ARGUMENT

A. This appeal must be dismissed because it is not justiciable

1. The district court's order regarding NRS 453D.200(6) and NAC 453D.255(1) is moot

This Court has long recognized that its judicial power is cabined by the justiciability doctrine. *In re Amerco Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (quoti*ng Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)). In doing so, this Court has specified that an actual, justiciable controversy is an essential predicate to this Court's ability to provide relief. *Id.*

The mootness doctrine is a cornerstone of that jurisprudence. This Court adheres to the general rule that denies review to cases rendered moot by the happening of events subsequent to the initial controversy. *NCAA v. University of Nevada,* 97 Nev. 56, 624 P.2d 10 (1981). Courts cannot render advisory opinions on moot or abstract questions. *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 110 (1981).

This principle squarely applies here. The mootness doctrine precludes both review of a law through declaratory relief to test its constitutionality and injunctive relief to compel compliance. *See, e.g.,*

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 415 (1972). A request for prospective relief alone, founded on a challenge to a regulation which no longer applies to plaintiffs, does not present an actual case or controversy. *See Burke v. Barnes,* 479 U.S. 361, 107 S.Ct. 734, 736 & note, 93 L.E.2d 732, 736 & note (1987) (interest in "lawmaking process" does not save legal challenge to expired statute from mootness; judicially cognizable injury no longer exists when statute ceases to be effective).

Here, the Nevada legislature repealed NRS 453D.200(6). 2019 Statutes of Nevada, page 3896. The legislature then created the Cannabis Compliance Board to create regulations to carry out its duties to regulate the marijuana industry. NRS 678A.450(1). And that is what it did in August 2020.[5] The legislature transferred power over retail marijuana licensure to the CCB on July 1, 2020. It repealed NRS 453D 200(6). The CCB repealed NAC 453D.255(1). Appellants' argument regarding whether NAC 453D.255(1) was unconstitutional is moot.

[5] https://ccb.nv.gov/wp-content/uploads/2021/12/TOC-Effective-NCCR-as-of-March-2021_v111521.pdf.

Appellants only sought prospective relief in the form of injunction and not a mandatory injunction. Mandatory injunctions restore the status quo, but this Court has only sanctioned them to restore water rights,[6] reconstruct roadways,[7] or to restore a view.[8] This Court has never applied this stern doctrine, which Appellants did not even request, outside of those limited contexts. And certainly not to this context, where nothing was wrongfully taken from Appellants.

Further, there is nothing to restore to Appellants. Appellants had no legitimate entitlement to a retail marijuana license. *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 406 P.3d 1199, 1217 (Wash. 2017) (quoting *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005)) (internal quotation marks omitted). Prior to the 2018 retail marijuana license competition, they lacked retail dispensary licenses. That is their status now.

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[6] *Memory Gardens of Las Vegas v. Pet Ponderosa M.G.,* 88 Nev. 1, 492 P.2d 123 (1972).

[7] *City of Reno v. Matley,* 79 Nev. 49, 378 P.2d 256 (1963).

[8] *Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358 (1986)

2. Appellants lack standing for their requested relief

The standing doctrine is another cornerstone of this Court's justiciability caselaw. Standing is a necessary element of a plaintiff's case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This means that each element of standing must be proved "with the manner and degree of evidence required at the successive stages of litigation." *Id*. The upshot of this principle is that the party invoking a court's subject matter jurisdiction has the burden to prove it. *Morrison v. Beach City, LLC*, 116 Nev. 34, 36-37, 991 P.2d 982, 983 (2000).

This Court recognizes that a party must have standing to seek each type of relief it seeks. A party lacks standing to seek mandamus relief if it will gain no direct benefit from its issuance or detriment if it is denied. *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004). A party does not have standing to seek declaratory relief unless (i) a claim of right is asserted against a party contesting it, (ii) the interests are adverse, (iii) the party seeking relief has a legally protectable interest, and (iv) the controversy is ripe for determination. *Doe*, 102 Nev. at 525, 728 P.2d at 444. Finally, standing to seek injunctive relief is lacking where the movant would not irreparable harm unique to

the movant and different from the general public. *See generally L&T Corp. v. City of Henderson*, 98 Nev. 501, 504, 654 P.2d 1015, 1016-17 (1982).

"Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). The "irreducible constitutional minimum of standing requires that [1] a plaintiff have suffered an injury in fact that is not merely conjectural or hypothetical, [2] that there be a causal connection between the injury and the conduct complained of, and [3] that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Miller v. Ignacio*, 112 Nev. 930, 936 n.4, 921 P.2d 882, 885 n.4 (1996) (quoting and citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136 (1992) (internal quotation marks omitted).

Appellants cannot show an injury in fact to support a request for injunctive relief. To obtain standing to sue for injunctive relief, the litigant must demonstrate an actual injury, i.e., one that is both real and immediate. *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983); *see Doe*, 102 Nev. at 525-26, 728 P.2d at 444-45. Even if we assume that any of Appellants' theories are correct, past exposure to supposedly wrongful

conduct does not create standing to sue for injunctive relief because there is no threat of imminent harm to restrain. Appellants did not allege, let alone provide the district court with evidence, that they are likely to apply for a retail marijuana license. There is no threat of imminent harm to Appellants.

Appellants argue that NAC 453D.255(1) was an unconstitutional annulment of Ballot Question 2. NevCann Br. 10; *see also* Herbal Choice Br. 28-34. Appellants also contest the Department's decision to score applications that lacked a physical address. *see* Herbal Choice Br. 22-28. "[A] requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional statute and which would be redressed by invalidating the statute." *Elley,* 104 Nev. at 416, 760 P.2d at 770. Appellants never explain how NAC 453D.255(1), or the lack of an address on an application of a competitor, injured them.

For the same reasons, Appellants lack standing to seek mandamus relief. A party lacks standing to seek mandamus relief if it will gain no direct benefit from its issuance or detriment if it is denied. *Heller,* 120 Nev. at 461, 93 P.3d at 749. If this Court, for example, were to issue an order directing the voiding of a license, then Appellants would remain as

they are currently, without a dispensary license because of the number of competitors that finished well ahead of Appellants in the rankings.

Appellants contend that the Department failed to follow the law. Herbal Choice Br. 20. However, a generalized grievance that the government has not acted legally is not an injury in fact. Courts must "decide actual controversies . . . and not to give opinions upon . . . abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *NCAA*, 97 Nev. at 57–58, 624 P.2d at 10) (citing cases).

Even assuming the mere loss in a competitive application process qualified as an injury in fact, Appellants failed to show a causal connection between the denial of their licenses and the alleged infirmities in the application process. Causation in the standing context requires the plaintiff to prove with evidence the nexus between the conduct complained of and the injury in fact. *Miller*, 112 Nev. at 936 n.4, 921 P.2d at 885 n.4. Appellants made no attempt below to bridge the gap separating their allegations of an injury, i.e., denial of a license, and the conduct them complaint about in their operative complaint.

The glaring hole in the causal chain is readily apparent by reviewing the results from the competition. There are legions of competitors between Appellants and the winning places. Of those higher achieving competitors who still lost, Appellants cite no evidence that alleged wrongdoing applies to them. Accordingly, Appellants' loss in the 2018 retail marijuana competition is not traceable to the conduct they complain about in their pleading and opening briefs.

Appellants have another causation problem that they ignore. Appellants questioned the completeness of the successful applicants' applications without showing that their own applications were complete. All appellants "heavily redacted their own applications," as the District Court observed. 333 JPA 46837. In fact, the little that was disclosed demonstrated that Appellants did not have complete applications. For example, Herbal Choice Inc. submitted an application that was missing several required sections, including the board members, the organizational structure, and the attestation. 325 JPA 45769-45771. 325 JPA 45769-45771. Appellants' entire lawsuit—and their appeal—is an exercise in abstraction.

Similarly, Appellants lack standing to appeal because a favorable decision would not redress their purported injury. *See Elley*, 104 Nev. at 416, 760 P.2d at 770. None of the Appellants proved they would have been successful and obtained licenses if certain applications of their competitors were stricken, as the District Court recognized. 333 JPA 46870, 46874 (¶¶ 75, 102). Appellants' Opening Brief does not point to any evidence that the district court overlooked. Because a favorable result in Appellants' appeal would leave Appellants precisely where they are, without a retail dispensary license, their case is not justiciable.

B. Even if the district court's declaratory and injunctive relief order remains a live controversy, the district court correctly determined that no successful applicant should be enjoined from receiving a final inspection prior to licensure

Appellants contend that this Court should expand the district court's injunctive relief order to enjoin specific applicants who allegedly did not disclose prospective owners, officers, and board members under NRS 453D.200(6). Herbal Br. 28. Appellants' argument lacks legal and factual support.

Appellants then mistakenly write that "[t]he DOT submitted no evidence to support a determination that these previously enjoined

applicants had in fact provided all of the information required regarding its owners…" Herbal Br. 31. But Appellants ignore that the preliminary injunction order did not enjoin any specific licensee, or even mention them by name. Further, it was Appellants' burden at the district court level to demonstrate with admissible evidence all of the elements required for permanent injunctive relief. *State Farm Mut. Auto. Ins.*, 109 Nev. at 928, 860 P.2d at 178. Lastly, courts should not enjoin conduct that has not been found to violate any law. *See, e.g., Penthouse Int'l, Ltd. v. Barnes,* 792 F.2d 943, 950 (9th Cir. 1986).

Appellants cite nothing in the record to support their argument that any particular applicant failed to disclose their prospective owners, officers, and board members. Herbal Br. 31. In fact, ownership would have been approved in the Early Start program, and with respect to Nevada Organic Remedies, LLC, immediately prior to the 2018 retail application process. 343 JPA 48163.

Because they lack admissible evidence in the record to support their theory, Appellants mistakenly seek to flip the burden of proof onto the Department. Herbal Br. 32. Appellants cite to cases interpreting judicial review proceedings under NRS 233B.135(3). However, the 2018 retail

marijuana process is not a contested case. *State, Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev. 809, 815-16, 407 P.3d 327, 332 (2017) ("*Samantha*"). Disappointed applicants do "not have a right to judicial review under the APA or NRS Chapter 453[D]." *Samantha*, 133 Nev. at __, 407 P.3d at 328, 332. Thus, the "substantial evidence" standard applicable to contested cases does not apply to the Department's compliance with NRS 453D.200(6).

C. The district court correctly determined that none of Appellants' other claims have merit

Appellants asserted causes of action for violations of substantive due process, procedural due process, equal protection of the laws and sought declaratory relief, mandamus relief, injunctive relief, and damages. RA 263. Here, the district court in its findings of fact and conclusions of law denied these claims and the requested relief such as mandamus, judicial review, and damages. *See* 333 JPA 46833, 46844; *see also* 333 JPA 46876. Appellants do not seriously challenge the district court's ruling.

Appellants argue that the district court found multiple flaws in the application and scoring process yet refused to grant injunctive relief beyond its NAC 453D.255 order. Herbal Br. 3-5. Appellants ignore that

"an injunction may issue to restrain a wrongful act that gives rise to a cause of action." *State Farm Mut. Auto. Ins. v. Jafbros Inc.,* 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). Appellants never explain how any of the conduct they describe could support the elements of a cause of action.

Appellants write that the district court erred by not enjoining applicants whose applications lacked a physical address. Herbal Br. 22-23. Appellants' argument is barred by NRS 453D.210(5)(b)'s plain language and this Court's analogous ruling in *Nuleaf CLV Dispensary, LLC*, supra.

The starting point for interpretation is a statute's language. *Robert E. v. Justice Ct.,* 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). If the statute's meaning is clear from the language actually used, then the court's inquiry is over. *Id*. When analyzing NRS 453D.210(5)(b), this Court can end there too. The language in the statute, i.e., "shall approve" in no way limits the Department's ability to accept applications that did not list a physical address.

This Court should also interpret NRS 453D.210(5)(b) harmoniously with the rest of Chapter 453D. Firmly entrenched rules of construction counsel this Court to interpret "statutes within a statutory scheme

harmoniously with one another to avoid an unreasonable or absurd result. *Allstate Ins. Co v. Fackett*, 125 Nev. 132, 206 P.3d 572, 576 (2009). This Court understands that the legislature created the statute *sub judice* "with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985).

Here, Appellants also do nothing to challenge the Department's power to create conditional licensure under NRS 453D.200(1)(a). Because the Department had this power, it necessarily follows that the physical address language in NRS 453D.210(5)(b) was not a mandatory requirement at the application stage since the location of the marijuana establishment was subject to change at the conditional licensee's discretion so long as it was suitable. NRS 453D.200(1)(j). It would be an absurd interpretation to elevate the physical location language in section 453D.210(5)(b) into a prerequisite when another part of Question 2 states location is subject to change at any time by the applicant so long as other suitability requirements are met.

Contrary to Appellants' argument (Herbal Br. 24), the fact that NRS 453D.210(5)(b) resulted from an initiative does not alter the Court's

analysis. "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." *In re Lance W.*, 694 P.2d 734, 889 (Cal. 1985). As explained above, nothing in NRS 453D.210(5)(b) prohibited the Department from considering an applicant that did not include a physical location, as the district court found. 333 JPA 46842 (¶ 30).

That Appellants barely pay lip service to *Nuleaf* tells the Court all it needs to know. *Nuleaf* affirmed the licensing authority's discretion because, like here, (i) the license certificates were "provisional" until final licensure and (ii) though NRS 453A.322(3)(a) required DPBH to register medical marijuana establishments meeting that subsections' zoning requirements, nothing prohibited DPBH from considering applicants lacking zoning approval. *Nuleaf*, 134 Nev. at 134, 414 P.3d at 310.

Next, Appellants contend that the application process was unfair because the revised application was not publicized by the DOT. First, this is wrong as a factual matter, as the district court found, the revised application was sent out through the Department's listserv. 333 JPA 046873, ¶98. Second, Appellants' arguments lack legal merit as applied to them since injunctive relief is not available absent a real, irreparable

injury that is particular to the plaintiff resulting from the unlawful conduct. *Berryman v. Int'l. Brotherhood of Electrical Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388 (1966). Appellants do not argue, and certainly do not cite any evidence, that they did not receive the revised application. Even if allegedly others did not, Appellants cannot assert the rights of unnamed third parties to create an injury they did not personally suffer. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

Lastly, Appellants write that by eliminating the physical address from the application, the Department showed favoritism and undermined the competitive bidding process. Even if Appellants could tie their argument to the elements of a cause of action they actually pled (which they cannot), the testimony of their own expert contradicts their conclusion. TGIG, LLC, after all, had all the same access to information that supposedly was closeted amongst the winning applicants, but lost anyways. *Compare* 312 JPA 44519-20 and 333 JPA 046870 ¶75 n.29. To paraphrase what Mr. Smith said, under such circumstances, the conclusion to draw is that the process worked as it should.

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D. The district court correctly determined that an adverse inference does not shift the burden of proof on liability

A chasm separates Appellants' allegations of an injury, i.e., denial of a license, and the alleged wrongful conduct described in their operative complaint. To traverse this gaping hole in their case, Appellants seek to flip the burden of proof onto Respondents because of the Court's spoliation ruling. NevCann Br. 13-15. Appellants' argument is legally and factually wrong.

As a legal matter, Appellants' argument is foreclosed by *Bass-Davis v. Davis*, 122 Nev. 422, 134 P.3d 103 (2006). The district court in its findings of fact and conclusions of law merely held that it could infer that evidence on Jorge Pupo's phone would have been adverse to the Department. 333 JPA 46853-54. A negative inference does not change the burden of proof on liability, but merely goes to the establishment of a fact. *Bass-Davis*, 122 Nev. at 448-49, 134 P.3d at 106-07.

Appellants' arguments regarding the adverse inference are also factually irrelevant. Appellants contend that "[w]ithout knowing the entirety of the information shared by Pupo with select applicants, the Appellants could not have known or shown whether such information

would have changed their likelihood of success in the licensing process." NevCann Br. 13. The problem for Appellants is the public record. For example, there are 17 competitors ahead of the highest ranked Appellant in North Las Vegas. RA 402-04. There are 15 competitors ahead of the highest ranked Appellant in the City of Las Vegas. *Id*. Appellants never explain how they could leapfrog their competitors into winning positions.

Finally, Appellants ignore that the spoliation ruling applied equally to their other failed claims for relief. Appellants never develop arguments to dispute the district court's adjudication against Appellants on those claims. The district court applied the correct standard of review and was equally correct in denying Appellants' request for equitable relief.

E. The district court applied the correct legal standard, but even if it did not, the error was harmless

Appellants contend that the district court disregarded the preponderance of the evidence standard to their equal protection claim. NevCann Br. 12-13. Appellants are mistaken. By its terms the district court applied the preponderance of the evidence standard and relied on NRS 33.010 in doing so. 333 JPA 046871, ¶83.

Appellants' contention is also flawed because, correctly understood, the substantial likelihood standard is lesser standard that applies to

preliminary injunctions. Substantial likelihood merely means a "fair chance of success." *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1362 (9th Cir.1988) (en banc). In contrast, permanent injunctive relief may only be granted if there is no adequate remedy at law, a balancing of equities favors the moving party, and success on the merits is demonstrated. *State Farm Mut. Auto. Ins.*, 109 Nev. at 928, 860 P.2d at 178. The standard for a permanent injunction is that the plaintiff actually succeeds on the merits. *Id.*; *see also Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12 (1987).

In sum, if there was any error in the use of the substantial likelihood language, it was harmless because it lessened the standard that Appellants would have to meet to prevail.

F. Appellants are pressing on appeal an equal protection theory that they did not plead

"The right [ ] to equal protection ... [is] guaranteed by the Fourteenth Amendment of the United States Constitution and ... Article 4, Section 21 of the Nevada Constitution." *Rico v. Rodriguez*, 121 Nev. 695, 702–03, 120 P.3d 812, 817 (2005). An equal protection claim fails absent "'a plaintiff [showing] that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in

a protected class.'" *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir.2001) (citation omitted). "'The first step in equal protection analysis is to identify the [defendants' asserted] classification of groups.'" *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1187 (9th Cir.1995) (citation omitted). The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified. *Id.*

At the outset, it should be noted that Appellants' equal protection appellate theories have nothing to do with their operative complaint's allegations. Appellants below alleged that they were discriminated against because the Department's criterion of merit benefits only those applicants that already had retail licenses as opposed to those only having a cultivation or production license. RA 279-80, ¶121-23. Appellants then alleged the criterion of merit encouraged economic protectionism. RA 280, ¶¶124-26. Lastly, Appellants alleged that the scoring of their applications was arbitrary. *Id.*, ¶127(a)-(f).

Appellants contend that the district court refused to find a violation of equal protection based on a theory of unequal access to information. NevCann Br. 11. The district court was quite right in doing so. Appellants never pled such an equal protection theory. Here, the district court in its

order denied all claims for relief, except equal protection based on the court's view that NAC 453D.255 (1) was constitutionally infirm. 333 JPA 46876.

This Court should not tarry long over THC Nevada, Inc.'s newly discovered "class of one" equal protection argument. To prevail on a "class of one" equal protection claim, the plaintiff must prove by a preponderance of the evidence that it "' she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."' *Maltifano v. Storey Cty*., 133 Nev. 276, 284, 396 P.3d 815, 821 (2017) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Here, THC Nevada, Inc. contends that the Department treated it differently to other applicants. Herbal Br. 36-37. According to THC Nevada, Inc., it does not dispute that it gave the Department false information warranting a fine and a denial of its distributor's license (*Id.* at 38), but objects to retail dispensary applicants not receiving a similar punishment who did not list a physical address in their retail dispensary applications. *Id*.

THC Nevada, Inc.'s argument is flawed for several reasons. First, THC Nevada, Inc. never pled this claim in its operative complaint. RA 279-81. No authority permits THC Nevada, Inc. to raise this issue for the first time on appeal, let alone on a claim they never pled.

Second, THC Nevada, Inc. never points to any evidence supporting the essential element of intentionally treating THC Nevada, Inc. differently. In fact, THC Nevada, Inc. concedes earlier in its brief that the Department's policy of not requiring a physical address on the 2018 retail marijuana application was applied equally to all applicants. Herbal Br. 22-23.

Third, THC Nevada, Inc. never explains how it and applicants in the 2018 retail marijuana competition are similarly situated. THC Nevada, Inc. submitted a doctored document. Br. 37. The applicants in the 2018 retail marijuana competition complied with the express terms of the revised application, which told them to only list a physical address if they owned or had the written permission of the owner for the location. There is nothing similar between the two situations.

Even accepting THC Nevada, Inc.'s absurd premise that failing to list an address in a retail dispensary application is fraudulent, THC

Nevada, Inc. cannot construct an equal protection claim thereon. Executive branch officers have wide discretion as to whether it prosecutes or how it investigates any conduct. *Jones v. State of Nevada ex. rel. Eighth Jud. Dist. Ct.*, 67 Nev. 404, 409-12, 219 P.2d 1055, 1058-59 (1950). THC Nevada, Inc. never argues that the Department's decision was in any respect based on an unjustifiable classification. *Salaiscooper v. Dist. Ct.*, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001). The Department's decision to not require a physical address in the application was rationally based on prior history from the medical marijuana license competition, its sound construction of the language of NRS 453D.210, and its undisputed power to create conditional licensure leaving location and zoning approvals to be resolved prior to final licensure.

G. The district court correctly determined that the balance of the equities does not favor further equitable relief

The district court determined that the balance of the equities did not favor Appellants' request for greater equitable relief. 333 JPA 046869, ¶76. The district court was correct in so finding. Appellants do not argue otherwise, let alone develop persuasive arguments based on cites to the record in their briefs.

Appellants' main gripe is that it would be inequitable to permit the issuance of licenses where successful applicants did not submit a "complete application." As shown above, this is wrong as matter of law, but it is also wrong as a matter of equity. None of the Appellants demonstrated that their applications were complete if held to the standard of their own argument. The Appellants' applications were heavily redacted and remained so. 333 JPA 46837. Appellants cannot meet their burden on the balance of equities by shielding their own conduct from scrutiny, especially where, what little was disclosed demonstrated a lack of compliance with their own allegations.

H. The public interest does not favor Appellants' request for further equitable relief

The public interest favors denying further injunctive relief and dismissing this appeal. The public voted for recreational marijuana to be legalized. NRS 453D.020(1). It voted for the proceeds to be applied to public education. *Id*. And that is just what has been done. Legalizing recreational marijuana has brought an economic windfall for public education in this state in the form of over $150 million dollars in FY 2021 alone.

Appellants' citation to a case from New Jersey is not on point. Herbal Br. 33. Critically, the law in New Jersey contemplated judicial review of the licensing agency's decisions in awarding licensure including reviewing the scores given. *See In re Matter of the Application for Medicinal Marijuana Alternative Treatment Center for Pangaea Health & Wellness, LLC*, 465 N.J. 343, 382-83 (N.J. Super. 2020) (A.3d 688 (Decided November 25, 2020). In contrast, nothing in Chapter 453D contemplates judicial scrutiny under NRS 233B of the dispensary licensing process. Had the voters wanted to do so, they could have provided for such matters as notice and opportunity to be heard in NRS 453D. They did not.

In sum, because there is nothing in the record that favors equitable relief, the public interest clearly supports denying Appellants' request for further injunctive relief. This Court should permit the successful competitors to continue with their businesses, which deliver the benefits the public desired, legalized retail marijuana that frees up law enforcement and provides important funding for public education.

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VIII. CONCLUSON

For these reasons, Respondents respectfully request that this Court either (i) dismiss Appellants' appeal, or (ii) affirm the district court's order to deny Appellants further equitable relief.

Dated this 29th day of March, 2022.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
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CERTIFICATE OF COMPLIANCE

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Dated this 29th day of March, 2022.

AARON D. FORD
Attorney General

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 29th day of March, 2022, and e-served the same on all parties listed on the Court's Master Service List.

/s/ Mary Pizzariello
An employee of the Office
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