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 GREEN LEAF FARMS HOLDINGS LLC,

Appellants,

v.

THE STATE OF NEVADA DEPARTMENT OF TAXATION,

Respondent.

RESPONDENTS' ANSWERING BRIEF

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I. STATEMENT OF JURISDICTION

Respondents State of Nevada ex rel. the Nevada Department of Taxation and the Cannabis Compliance Board (collectively, the "Department") agree with the TGIG appellants[1] that this Court has appellate jurisdiction over a final judgment and over an order granting or refusing to grant an injunction under Nev. R. App. P. 3A(b)(1) and Nev. R. App. P. 3A(b)(3), respectively.

Here, the District Court divided the trial and claims in three phases—the Petition for Judicial Review Claims (Phase 1); Claims relating to the legality of the application process (Phase 2); and the Mandamus claims (Phase 3). II RA 393-395.[2]

Only the claims in Phases 1 and 2 were tried. No final judgment has been entered in Phase 3, on TGIG's Mandamus claim. 49 JPA 6044 (¶¶ 99-104); 333 JPA 46833 (fn.1); 333 JPA 46848 (fn.1).[3] Thus, there is no final judgment that "resolves all of the parties' claims and rights in

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[1] In this brief, "TGIG" or "TGIG appellants" refers to the group of fourteen appellants led by appellant TGIG, LLC.

[2] "RA" refers to Respondents' Appendix. The Roman numerals preceding RA refer to the volume where the cited page is found.

[3] "JPA" refers to Plaintiffs' Joint Appendix. The number preceding JPA refers to the volume where the cited pages are found. Any zeros preceding the page numbers are omitted.

the action, leaving nothing for the court's future consideration except for post-judgment issues." *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 87, 247 P.3d 1107, 1108 (2011).

TGIG does not point to any filing in the record whereby TGIG abandoned its Mandamus claim, although by appealing from the orders entered in Phases 1 and 2, TGIG appears to have waived it. *Nev. Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (waiver is found when conduct clearly indicates a party's intent not to enforce a right). As a result, TGIG's appeal appears premature. *Rib Roof, Inc.*, 127 Nev. at 87, 247 P.3d at 1108; *cf. Matter of Est. of Sarge*, 134 Nev. 866, 866–67, 432 P.3d 718, 720 (2018) (challenged order "resolved one of three consolidated cases").

II. STATEMENT OF THE ISSUES

1. The TGIG appellants are unsuccessful applicants for licenses to operate retail recreational marijuana establishments ("RMEs") in the 2018 licensing process. They alleged and proved no right to a license, or a causal connection between flaws in the licensing process and their failure to win licenses that a do-over of the process would redress. Did TGIG lack standing to challenge the validity of the licensing process?

2. NRS 453D.210(5) does not prohibit the Department from considering applications that do not list a physical address. The RME licenses that the Department awarded were conditional on compliance with zoning and land rules and subject to final approval. The physical address had no value in the scoring of applications. Did the Department have discretion to consider applications without a proposed physical address?

3. TGIG does not have a legitimate claim of entitlement to an RME license. TGIG proved no damage from new RME licenses coming onto the market. TGIG proved no harm from flaws in the RME licensing process. Did the District Court abuse its discretion by denying TGIG a remedy?

4. The RME application process is not a contested case that gives rise to a right of judicial review. TGIG did not meet its burden of proof that the Department's denial of their applications violated the law or was arbitrary or capricious. Did the District Court correctly deny TGIG's petition for judicial review?

III. STATEMENT OF THE CASE[4]

A. Nature of the Case

This case is about TGIG's unsuccessful applications for licenses to operate recreational retail marijuana establishments ("RMEs") in 2018. Because the applications exceeded available RME licenses, the Department had to numerically and impartially rank applications according to criteria set out in NAC 453D.272(1).

When the Department announced the winning applicants in each jurisdiction on December 5, 2018, and TGIG was not among them, TGIG and many other unsuccessful applicants filed lawsuits against the Department. TGIG Opening Brief ("OB") at 6.

B. Course of the Proceedings

After the District Court issued a preliminary injunction in 2019, the parties conducted discovery, including by taking the depositions of the applicants, Department employees, expert witnesses, and others. 280 JPA 40324 – 329 JPA 46355.

The District Court's Trial Protocol divided the trial and claims in three phases: Phase 1—Petition for Judicial Review; Phase 2—Claims

[4] This section supplements portions of TGIG's statement of the case.

related to the legality of the 2018 RME application process (Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advantage, Intentional Interference with Contractual Relations, and Permanent Injunction); and Phase 3—Mandamus claims on improper scoring. II RA 393–395.

On June 12, 2020, the Department[5] filed the "record on review" for Phase 1 of the trial. II RA 376-380; 75 JPA 9890 – 269 JPA 38867. The Department supplemented the record on June 26, 2020. 270 PA 38872–38947.

On July 17, 2020, the bench trial for Phase 2 started. 333 JPA 46848 (fn. 1). Trial lasted twenty days and concluded on August 18, 2020. 333 JPA 46848. Multiple witnesses testified live and via deposition testimony. 280 JPA 40324 – 329 PA 46355; III RA 512-533. The District Court heard testimony from: (a) four Department employees involved in the application process and training of the individuals who scored the applications; (b) three individuals who scored the applications; (c)

[5] The JPA mistakenly identifies the Department's notice and record on review as "Plaintiff's Notice" and "Plaintiff's [sic] record." *See* JPA Table of Contents at unpaginated pages 18 through 23 (items 185 through 257). The Department filed and gave notice of the record. 75 JPA 9890; II RA 376-380 (omitted from JPA).

multiple unsuccessful applicants, such as TGIG, LLC, Fidelis Holdings, LLC ("Fidelis"), Medifarm, LLC ("Medifarm"), and THC Nevada, LLC ("THC"); (d) Amanda Connor, an attorney who assisted TGIG, LLC and other applicants with their applications; (e) Jorge Pupo, the Department's former deputy director; and (f) three Plaintiffs' experts, among others. *Id.*

On September 8, 2020, the District Court held a one-day bench trial on Phase 1, where the parties, through their counsel, presented arguments on plaintiffs' judicial review claims. 333 JPA 46833, 46836.

C. Disposition Below

1. Trial Phase 2

On September 3, 2020, the District Court issued its Findings of Fact and Conclusions of Law ("FFCL") on Phase 2 of the trial. 333 JPA 46848. Although the District Court found several flaws in the RME application process—such as the absence of a single point of contact, the late decision to delete the physical address requirement, and the insufficient training of the graders—the District Court concluded that the flaws were "insufficient to void the [application] process." 333 JPA 46863 (¶ 36), 46866 (¶¶ 52, 54), 46868 (¶¶ 60-61), 46873 (¶ 97), 46874 (¶ 100).

In relevant part, the District Court found no relief was warranted because regardless of the flaws, the Department treated all applicants the same way in the grading process. 333 JPA 46874 (¶ 102). The plaintiffs did not prove by a preponderance of the evidence that "they would have been successful in the ranking process" if the Department had created a single point of contact that gave applicants equal access to Department officials. 333 JPA 46870 (¶ 75). In this regard, the District Court observed that TGIG, LLC had the same "direct contact with [the Department's deputy director Jorge] Pupo" as some of the successful applicants it sued. 333 JPA 46870 (fn. 29). TGIG, LLC was therefore tainted. *See id*. (¶ 75) (defining the other plaintiffs as the "Untainted Plaintiffs").

The District Court did not award damages or other relief on TGIG's due process claims because "the market is not currently saturated" and "[g]iven the number of variables related to new licenses, the claim for loss of market share is too speculative for relief." 333 JPA 46869 (¶ 73), 46876.

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2. Trial Phase 1

On September 16, 2020, the District Court entered its FFCL on Phase 1 and denied TGIG's petition for judicial review "in its entirety." 333 JPA 46833, 46844.

First, the District Court observed that TGIG and most other unsuccessful applicants had "heavily redacted" their own applications that were part of the administrative record and had not provided their applications to the District Court in unredacted form. 333 JPA 46837. This limited the District Court in its "ability to discern information relevant to this Phase [1]." *Id*. (fn. 9). For example, the District Court could not determine if the TGIG plaintiffs' applications were complete and were properly considered by the Department under NAC 453D.272(1). 333 JPA 46840 (¶ 17 and fn. 14).

Second, the District Court found that the plaintiffs failed to identify "by a preponderance of the evidence any specific instance with respect to their respective applications that the procedure used by the DoT for analyzing, evaluating, and ranking the applications was done in violation of the applicable regulations or in an arbitrary and capricious manner." 333 JPA 46841 (¶ 26).

Third, the District Court recognized that *State, Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev. 809, 815-16, 407 P.3d 327, 332 (2017) "limits the availability of judicial review" but that "regardless of whether the vehicle of judicial relief is appropriate, no further relief will be granted in this matter." 333 JPA 46841 (fn. 16).

The District Court concluded that it had "previously held that the deletion of the physical address requirement given the decision in *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 414 P.3d 305, 308 (Nev. 2018) does not form a basis for relief." 333 JPA 46842 (¶ 30).

The District Court further concluded that: (1) the "Record is limited and Plaintiffs themselves redacted their own applications at issue"; (2) the Record "does not support Plaintiffs' Petition"; (3) Plaintiffs cite no "evidence in the Record that supports their substantive arguments"; and (4) Plaintiffs failed to meet their burden of establishing that the Department in granting or denying the license applications violated the law or procedures, abused its discretion, or acted in an arbitrary or capricious manner. 333 JPA 46843 (¶¶ 37-40).

IV. STATEMENT OF FACTS

A. A limited number of RME licenses becomes available

Each TGIG appellant holds one or more licenses to operate a medical and recreational marijuana establishment. 49 JPA 6034 (¶ 47).

When voters in Nevada adopted Ballot Question 2 in 2016, all holders of a medical marijuana license for the cultivation, production, or the sale of medical marijuana could obtain one recreational marijuana license of the same type. NRS 453D.210(2); NAC 453D.265; 282 JPA 40828. They could also apply for additional licenses of a different type in the competitive application process. NAC 453D.268. However, only 64 retail marijuana store licenses were available in Nevada. II RA 409-410. 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.*

B. TGIG receives the RME application forms

RME license applicants or their representatives were registered with the Department's Listserv, through which communications were sent about the application process. 270 JPA 38873.

On July 6, 2018, the Department posted the application form for RME retail store licenses on Listserv. OB at 13. The Department modeled the application form after the one used in 2014 for the medical marijuana licensing application process. 295 JPA 42395, 42398.

Soon after posting the application, the Department received inquiries from the industry on how to deal with the requirement to list a physical address if the applicant did not yet have a proposed location for the proposed RME. 270 JPA 42415–16; 283 JPA 40888–90.

On July 30, 2018, the Department circulated a revised application that required applicants to list a physical address "if the applicant owns property or has secured a lease. . . (this must be a Nevada address and not a P.O. Box)." 270 JPA 38913, 38934, 38942.

None of the TGIG appellants claimed that they did not receive the revised application. Nor did any TGIG appellant contend that that they asked the Department for clarification about the address requirement (or any other aspect of the application) but that the Department failed to provide it. 322 JPA 45650–51. Several TGIG applicants communicated with the Department and its deputy director directly or through their attorney. 325 JPA 45779, 45845; 321 JPA 45397–98, 45402.

And no TGIG applicant objected to the Department's adoption of a regulation that only owners holding a 5% or more interest in the applicant must be disclosed on the application. 325 JPA 45736.

C. The Department accepts TGIG's RME applications

Between September 7 and September 20, 2018, the TGIG appellants submitted applications for licenses to operate recreational retail marijuana stores. II RA 377–379.

TGIG, LLC's applications did not list a physical address but a P.O. Box. 321 JPA 45430. Medifarm did not list all its 130,000 shareholders. 322 JPA 45543. Nevada Pure did not list two owners of its company who held less than 5% of the ownership. 325 JPA 45727–28. Herbal Choice, Inc. ("Herbal Choice") submitted an application that missed several sections, including the board members, the organizational structure, and the attestation. 325 JPA 45769–71.

The Department accepted and scored all the TGIG appellants' applications. *See, e.g.*, 264 JPA 37983–84 (Gravitas), 38025–28 (Fidelis), 38094–99 (TGIG); 265 JPA 38311–13 (Herbal Choice).

D. Six independent graders score the applications

The Department hired six temporary employees to score the RME applications. 299 JPA 42857; 300 JPA 42956. Three of the graders scored the portions of the applications with the "identified" criteria—*e.g.*, the educational background of the officers, the organizational structure, and diversity of the owners, officers, and board members of the applicant. 300 JPA 42996. The other three graders scored the so-called "non-identified" criteria of the applications—*e.g.*, the adequacy of the building plan and the integrated plan for the care, quality, and safekeeping of marijuana from seed to sale. 298 JPA 42705, 42707; 299 JPA 42864; III RA 543.

The six graders received two weeks of training from Department employees Ky Plaskon, Karalin Cronkhite, Steve Gilbert, and Damon Hernandez. 291 JPA 41984–85; 295 JPA 42523, 42528, 42555; 298 JPA 42697; 300 JPA 42996–97; 303 JPA 43225; III RA 533. The graders received both general training about the regulation and background of medical marijuana in Nevada, as well as hands-on training on the scoring of applications. 295 JPA 42523, 42528, 42555; 298 JPA 42697–42698, 42748; 300 JPA 43006, 43030; RA 532. They used mock applications to

test their scoring. *Id.*; *see also*, *e.g.*, 291 JPA 41996–97; 295 JPA 42553. They used scoring tools, which gave guidance on how to score each section, including by providing ranges of points that could be awarded based on the content and quality of the application for each section. 298 JPA 42711; 300 JPA 43084, 43094; II RA 475–499; III RA 500–511.

Once the applications rolled in and actual scoring began, the graders scored applications individually first. 299 JPA 42861. After the individual scoring, the three graders in each group would meet and compare scores to make sure there were no large discrepancies between their scores, which could indicate they had missed something. 298 JPA 42808; 299 JPA 42862; 300 JPA 43084; 303 JPA 43247; III RA 539.

The Department had no input in the scoring of any application. 290 JPA 41790; 300 JPA 43018; 303 JPA 43247.

E. The TGIG applicants do not come close to winning Licenses

On December 5, 2018, the Department released the results of the 2018 RME license application process. II RA 402-408.

None of the TGIG appellants came close to being in contention for the available licenses in each county, as the following charts illustrate:

Clark County- Las Vegas[6]

Rank	Appellants	License awarded yes/no
1-10		Yes
11		No
12		No
13		No
14		No
15		No
16		No
17		No
18		No
19	TGIG	No
20		No
21		No
22	Gravitas	No
23		No
24		No
25	Red Earth	No
26-34		No
35	Green Therapeutics	No
36-46		No
47	GBS Nevada	No
48-53		No
54	Medifarm	No
55	Nevada Holistic Medicine	No
56-57		No
58	THC Nevada	No
59-64		No
65	Nevada Pure	No
66-78		No
79	NevCann	No
81	Green Leaf	No
85	Herbal Choice	No

[6] Source: II RA 402-403 (Joint Trial Exhibit 84, 2018 Retail Marijuana Store Application Scores and Rankings).

Clark County-North Las Vegas[7]

Rank	Appellant	License awarded yes/no
1-5		Yes
6		No
7		No
9		No
10		No
11		No
12		No
13		No
14		No
15		No
16		No
17	TGIG	No
19	Gravitas	No
20		No
22	Red Earth	No
23-30		No
31	Fidelis	No
32	Fidelis	No
33-45		No
46	THC Nevada	No

F. The TGIG applicants file suit

Within a month, the TGIG applicants and other groups of plaintiffs who were unsuccessful in obtaining licenses filed lawsuits. I JPA 1-78.

TGIG alleged, on "information and belief," that the denial of their applications was based on "the arbitrary and capricious exercise of

[7] Source: II RA 404.

administrative partiality and favoritism . . .” 1 JPA 44 (¶ 33). TGIG alleged no facts to support the allegation. *Id.*

Almost a year later, TGIG filed a second amended complaint, alleging again on “information and belief” that the Department “unlawfully . . . granted conditional licenses to applicants” who: (a) benefitted from non-public information shared selectively by the Department; (b) did not disclose “the true address” of their prospective retail marijuana store; (c) did not disclose each of their owners, officers, and board members; and (d) benefitted from partial scoring. 49 JPA 6034-636 (¶ 52(A)-(E)). TGIG also alleged that the grading process was unfair to them because the Department failed to train the individuals hired to score the applications. 49 JPA 6036 (¶ 52(I)).

TGIG made three civil rights claims: a due process claim based on alleged deprivation of property (Claim 1); a due process claim based on alleged deprivation of liberty (Claim 2); and a claim for Equal Protection (Claim 3). 49 JPA 6036–42. In addition, TGIG made a claim for Judicial Review (Claim 4); a Petition for Writ of Mandamus (Claim 5); and a claim for Declaratory Relief (Claim 6). 49 JPA 6043–45.

V. SUMMARY OF ARGUMENT

The Court should affirm the two judgments entered by the District Court. Both below and again on appeal, the TGIG appellants ignore the elephant in the room: Their own RME license applications. It simply never occurred to the TGIG appellants that their applications were not as deserving as those of the winning applicants. They criticized everyone except themselves for not obtaining RME licenses.

Unlike the plaintiff in *Nuleaf*, none of the TGIG appellants came close to being in contention for licenses. None of them even contend their applications were wrongly scored. TGIG did not allege—let alone prove—that they would have won licenses if the licensing process were different.

Instead, TGIG based their case on abstract legal argument and speculation on how the *successful* applicants obtained licenses: TGIG claimed on "information and belief" that the Department engaged in favoritism, granted licenses to applicants who received inside information, granted licenses to applicants who failed to list all their owners, and engaged in partial scoring.

None of TGIG's "information and belief" bore out at trial. In fact, the TGIG appellants' corporate representatives admitted they had zero

evidence to support their allegations that the process was unfair, partial, or that they were disadvantaged by the revised application:

> Q And you don't have any evidence that any D.O.T. employee engaged in any improprieties at all as it relates to the application process; correct?
> A Correct.

321 JPA 45413 (TGIG, LLC).

> Q So as you sit here as Fidelis's representative, you are unaware of any facts that Fidelis was disadvantaged; correct?
> A Correct.

325 JPA 45794 (Fidelis).

What *did* bear out at trial is that: (1) the graders were impartial and scored each license application on its merits; (2) the TGIG appellants had the same access to information about the application process as the successful applicants; (3) several TGIG appellants engaged in conduct they accused the successful applicants of; (4) none of the TGIG appellants were harmed by flaws in the licensing process; and (5) none of the TGIG appellants proved damage from new RME licenses coming on the market.

There is no basis for any remedy—let alone a do-over of the 2018 RME license application process. The process was not perfect, but it was fair. The TGIG appellants simply lost in a competitive licensing process

and deserve no second chance. The District Court got it (mostly) right. The District Court's orders should be affirmed.

VI. ARGUMENT

A. The TGIG appellants lacked standing to challenge the RME licensing process

"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).

Litigants must "personally" suffer an injury, *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988), which must be more than "a general interest that is common to all members of the public." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

1. TGIG did not suffer an injury in fact

Applicants for retail marijuana store licenses do not have "a legitimate claim of entitlement to the issuance of 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, 125 S.Ct. 2796 (2005)) (internal quotation marks omitted). Thus, the mere fact that TGIG did not win licenses in a competitive application process is not an injury in fact. *See id.* TGIG's hope to win licenses is too conjectural. *Cf. Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health*, 134 Nev. 129, 131, 414 P.3d 305, 307 (2018) ("*Nuleaf*") (plaintiffs would have ranked among winning applicants if Nuleaf were eliminated from the competition).

Moreover, "[a]bstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675 (1974). TGIG did not allege or prove that each of them personally suffered an injury in fact. With no right to a license, TGIG sought nothing more than an advisory opinion addressing abstract questions about the Department's alleged failure to comply with statutes and regulations, and the alleged deficiencies in the

licensing process. 49 JPA 6035–36, 6039, 6042-6043 (¶¶ 52, 69(a), 90, 97(b)).

But courts must "decide actual controversies . . . and not [] give opinions upon . . . abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 57–58, 624 P.2d 10, 10 (1981) (citing cases).

2. TGIG established no causal connection between the alleged wrongs and the denial of their applications

Even assuming the mere loss in a competitive application process qualified as an injury in fact, TGIG failed to show a causal connection between the denial of their licenses and the alleged flaws in the RME licensing process.

Specifically, TGIG never alleged or proved that, but for the alleged flaws in the process, each of them would have been successful in obtaining licenses. For example, they never alleged or proved that the lack of training of the graders affected the scoring of their applications but not those of the successful applicants. They never alleged or proved that their applications were unsuccessful because some of the successful applicants failed to include a physical location.

Put another way, TGIG's entire lawsuit—and their appeal—is an exercise in abstraction.

3. TGIG did not prove that voiding the process would result in TGIG obtaining licenses

TGIG also did not allege or prove that it was "likely, as opposed to merely speculative, that the [denial of their licenses would] be redressed" by a re-do of the process. *Miller*, 112 Nev. at 936 n.4, 921 P.2d at 885 n.4.

In fact, the evidence showed that TGIG's applications would have been disqualified under their own theories and should not even have been considered.

First, not a single TGIG plaintiff proved that their own applications were complete. The TGIG appellants "heavily redacted their own applications," as the District Court observed. 333 JPA 46837. Some TGIG appellants did not even disclose their applications. II RA 378–79 (Medifarm: "not disclosed"; NevCann: AEO (attorneys' eyes only)).

Second, while TGIG accused the Department of "unlawfully" granting licenses to successful applicants who had sales to a minor, failed to include a physical location, and failed to include all their owners, officers on their applications, several TGIG plaintiffs admitted that they, themselves: (1) submitted incomplete applications; (2) included a P.O.

Box instead of a physical address (TGIG); (3) did not list all their owners and officers (*e.g.*, Herbal Choice); (4) had sales to minors (Medifarm); (5) changed their boards to increase their diversity score; and (6) had a direct line of communication with the Department's deputy director. 49 JPA 6035–36 (¶ 52(A-K)); 321 JPA 45430; 322 JPA 45543–47; 322 JPA 45638–39; 325 JPA 45727–28, 45769–71.

Third, none of the other TGIG plaintiffs proved they would have been successful and obtained licenses if the process were redone, as the District Court recognized. 333 JPA 46870, 46874 (¶¶ 75, 102). TGIG's Opening Brief does not point to any evidence that the District Court overlooked. Thus, the District Court should have dismissed TGIG's complaint for lack of standing, as the Department and others urged it to do. II RA 359–375.

B. The Department's decision to forego the physical address requirement provides no basis for relief

An exercise of discretion is considered 'arbitrary' if it is "founded on prejudice or preference rather than on reason" and 'capricious' if it is "contrary to the evidence or established rules of law." *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (quoting Black's Law Dictionary (9th ed. 2009)). A government agency "acts

arbitrarily and capriciously when it denies a license without any reason for doing so." *City Council v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986).

As discussed below, the Department's decision to eliminate the physical address requirement was not arbitrary or capricious. It was supported by law—including *Nuleaf*, NRS 453D.210, and NAC 453D.282—and reason, including feedback from the industry.

1. The Department had discretion to accept applications that did not list a physical address

The District Court correctly held that "the deletion of the physical address requirement . . . does not form a basis for relief" under *Nuleaf*. 333 JPA 46842 (¶ 30).

In *Nuleaf*, the Department of Health and Human Services ("DHHS") had 90 days to decide whether to grant or deny a medical marijuana establishment registration certificate. *Nuleaf*, 134 Nev. at 130, 414 P.3d at 307. Since the local government still had to approve the establishment, DHHS—a state agency—was within its discretion to grant conditional licenses that did not yet include a physical address. *See id*. at 135, 414 P.3d at 310 (holding that DHHS had discretion to issue a "provisional certificate until the applicant is able to satisfy all applicable

zoning . . . requirements."). As this Court noted, "while NRS 453A.322(3)(a) states that the Department 'shall' register a medical marijuana establishment when it has satisfied that subsection's requirements, *nothing* in the statute prohibits the Department from considering an applicant that fails to meet the requirements." *Nuleaf*, 134 Nev. at 134, 414 P.3d at 310 (emphasis added).

Similarly, here, NRS 453D.210(5)(b) states that the Department "shall" approve an RME license application if the "physical address where the proposed [RME] will operate is owned by the applicant or the applicant has the written permission of the property owner to operate the proposed [RME] on that property." But nothing in NRS 453D.210(5) prohibited the Department from considering an applicant that failed to meet this requirement, as the District Court found. 333 JPA 46842 (¶ 30).

The Department's decision to accept applications without a physical address was well within its discretion and consistent with local zoning and land use law. The RME licenses the Department issued were "conditional" on "compliance with the zoning and land use rules adopted by the locality in which the marijuana establishment will operate . . . ."

NAC 453D.282(1)(a). The State's final approval of licenses does not take place until after the local jurisdiction approves the physical location. 295 JPA 42559-42560. Thus, accepting applications without a physical address did not violate NRS 453D.210(5) or its "express and implied legislative policy," as TGIG argues. OB at 27 (citing out-of-state cases). Moreover, the RME location was subject to change at the conditional licensee's discretion, so long as it was suitable. NRS 453D.200(1)(j).

TGIG's Opening Brief ignores *Nuleaf*. Instead, TGIG argues that all applicants who listed a "mail drop" in the address line submitted "false" and incomplete applications that should have been denied. OB at 22-23.

TGIG's argument is as stunning as it is wrong. First, TGIG, LLC itself only listed a "mail drop" on its applications:

Q. . . . the locations that TGI submitted were actually P.O. boxes at UPS stores; correct?
A Correct.

321 JPA 45430. Thus, under TGIG's theory, TGIG, LLC submitted a false and incomplete application that should have been denied. OB 23.

Second, NAC 453D.312 did not "require[]" the Department to "summarily" deny applications that listed a P.O. Box, as TGIG argues.

OB 23 (emphasis omitted). "Before denying an application for issuance . . . of a license for a marijuana establishment . . . pursuant to paragraph (b) of subsection 1 . . . the Department may provide the marijuana establishment with an opportunity to correct the situation." NAC 453D.312(5). Thus, TGIG's argument that the Department "effectively amended, modified or repealed" NRS 453D.210(5) or NAC 453D.312, OB at 28, is unfounded.

2. The application change was not arbitrary

There was nothing "blatant[ly] . . . arbitrary and capricious" about the Department's decision to accept and score applications without a physical address, as TGIG argues. OB at 26.

The decision to eliminate the physical address requirement came from feedback from the industry, which started long before applications were accepted: 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 40888–90; 295 JPA 42415–16.

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In fact, TGIG, LLC's board member, John Ritter, served on the Task Force and recommended that applications be scored without considering the proposed location. 321 JPA 45425–27.

3. The application change did not require a regulation.

Although NAC 453D.268(2)(e)[8] required applications to include a physical address, the Department was not required to adopt a regulation to amend NAC 453D.268 before accepting applications without a physical address. NRS 453D.210(5); *Nuleaf*, 134 Nev. at 134, 414 P.3d at 310.

TGIG's reliance on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954) ("*Accardi*") is entirely misplaced. *Accardi* did not involve a licensing process but an individual deportation decision. *Id*. at 261, 74 S. Ct. at 500. There, the petitioner alleged that the agency failed to use its discretion under the regulation and deported him because he featured on a confidential list of unsavory characters. *Id*. at 267-68, 74 S. Ct. at 503-04.

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[8] TGIG mistakenly cites NAC 453D.265(1)(b) throughout its brief, *e.g.*, OB at 28–29, but that regulation pertained to the so-called "one for one" applications for a license "of the same type" only. NAC 453D.265(1).

Here, by contrast, the Department used its discretion under NRS 453D.210(5) and changed the application for all applicants without singling any applicant out.

The Department's decision to amend the application cannot be compared to the "rate redesign" decision in *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983), which affected all consumers and was implemented without public notice. NRS Chapter 453D's requirements and policy to protect children from recreational marijuana remained intact: Applicants still had to comply with local zoning law and NRS 453D.210(5) before being granted final approval. And all TGIG appellants received the amended application and were on notice of the change to the application.

Thus, the Department could deviate from NAC 453D.268 without adopting a regulation.

4. TGIG showed no injury from the application change

"The threshold question in equal protection analysis is whether a statute [or decision] effectuates dissimilar treatment of similarly situated persons." *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).

There is no basis to set aside the entire application process if applicants are unable to show they were prejudiced by it. *Cf. Sys. Stud. & Simulation, Inc. v. United States*, 22 F.4th 994, 997 (Fed. Cir. 2021) ("bid award may be set aside" if "the disappointed bidder [can] show a *clear* and *prejudicial* violation of applicable statutes or regulations") (internal quotation marks and citations omitted) (emphasis added).

Here, not a single TGIG appellant alleged or proved it was harmed by the Department's decision to accept applications without a physical location, nor could they: The physical location of the proposed RME was not scored, which TGI knew. NAC 453D.272; 270 JPA 38894–95, 38930–31; 321 JPA 45431–32. Indeed, the TGIG appellants concede that their mandamus claim did not allege improper scoring of their applications. *See* OB at 8-9.

The District Court was thus mistaken when finding that the "floor plan, community impact, security plan, and the sink locations" criteria were "dependent on a physical location." 333 JPA 46868. The responses to these criteria always had to be provided in "non-identified" format, meaning without identifying the proposed location. 270 JPA 038926–27, 38919 (defining "non-identified criteria response" and requiring

applicants to remove identifiers such as "*street address*, *city, county, precinct, ZIP code* . . . .") (emphasis added).

Thus, TGIG's entire "physical address" argument is a red herring.

C. The District Court did not abuse its discretion to deny injunctive relief on TGIG's loss of market share theory

The District Court did not abuse its discretion in denying an injunction for TGIG's alleged loss of market share because TGIG: (1) has no due process right to a discretionary license; (2) has no property interest in a market share; (3) did not prove a violation of its rights; and (4) did not prove it was entitled to injunctive relief.

1. TGIG had no due process right to a license

TGIG complains that the District Court erred in not awarding a remedy for its due process claim, OB at 31-32, but TGIG's due process claim was dead on arrival.

"The Due Process Clauses of the United States and Nevada Constitutions prohibit the State from depriving any person 'of life, liberty, or property, without due process of law.'" *Malfitano v. Cty. of Storey By & Through Storey Cty. Bd. of Cty. Commissioners*, 133 Nev. 276, 282, 396 P.3d 815, 819 (2017) (citing U.S. Const. amend. XIV, § 1 and Nev. Const. art. 1, § 8(5)).

The mere unilateral expectation of receiving a license is not a property interest on which a due process claim can be based. *Malfitano*, 133 Nev. at 282, 396 P.3d at 819–20. Here, as in *Malfitano*, the Department "did not revoke existing licenses," nor did TGIG demonstrate "a legitimate claim of entitlement to the licenses at issue." *Id*. at 284, 396 P.3d at 821. Thus, TGIG's alleged loss of market share theory could not be founded on a due process claim to begin with, and its due process claim should have been dismissed at the outset.

2. NRS Chapter 598A creates no property interest in a market share

The protections of NRS Chapter 598A do "not apply" to conduct "expressly authorized, regulated, or approved" by statute or "administrative agency . . . having "jurisdiction of the subject matter." NRS 598A.040(3)(a)-(c).

Here, the issuance of new RME licenses was "expressly authorized" by NRS 453D.210, which tasked the Department with accepting additional applications and issuing new licenses for RMEs. In fact, NRS 453D.210 dictates that the Department "shall" accept qualifying applications so long as they do not exceed the statutory limit in each jurisdiction. NRS 453D.210(5)(d).

Thus, TGIG is wrong to contend that it has a "statutorily protected" property interest in a "market share" of the marijuana business under NRS Chapter 598A. OB at 32. The risk of TGIG's market share diminishing, OB at 35, 38, was inherent in and authorized by the Ballot Initiative codified in NRS Chapter 453D. 309 JPA 44047.

3. TGIG did not prove a violation of its rights

"It is axiomatic that a court cannot provide a remedy unless it has found a wrong." *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). A party seeking a permanent injunction must prove that its rights were violated. *Id.*; *see also* NRS 33.010(1) (plaintiff must be "entitled to the relief demanded. . .").

TGIG repeatedly argues that it has a right to be protected from "unfair competition" but failed to prove how any of them was treated unfairly in the licensing process. TGIG cannot blame its inability to prove damages on applicants (such as TGIG, LLC itself) that listed only a P.O. Box on their applications. OB at 35-36. TGIG was required to show that each of them was injured in their chances to obtain licenses because other applicants listed no physical address. TGIG failed to do so.

4. TGIG did not prove damages

"A party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages." *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (citing *Mort Wallin v. Commercial Cabinet*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989)). If, as here, a party uses "an expert economist" on damages, the expert's testimony must not be "speculative but [] based on facts known to the expert at the time." *Frantz*, 116 Nev. at 469, 999 P.2d at 360 (citing cases).

Contrary to TGIG's contention, OB at 33-34, the District Court did not err in treating TGIG's market share theory as a claim for damages, because TGIG's due process claim specifically asked for damages. 49 JPA 6040 (¶¶ 77-79).

TGIG's own experts testified that the market for recreational marijuana was not yet saturated and well below the national average of dispensaries per capita, so that new RME licenses would not necessarily diminish TGIG's market share. 309 JPA 44008, 44030–31; 318 JPA 45231–34. TGIG's expert did not quantify the applicants' market share before or after the award of RME licenses. 309 JPA 44051–52. Thus, the

District Court correctly concluded, based on TGIG's own experts' testimony, that there were too many variables related to new licenses and that the claim of loss of market share was too speculative for relief. 333 JPA 46869 (¶ 73).

5. TGIG was not entitled to the injunction it sought

"The decision to grant or deny a preliminary injunction is within the sound discretion of the trial court, and that discretion will not be disturbed absent abuse." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). TGIG failed to show an abuse of discretion.

Even assuming TGIG had a vested property right in an RME license and proved a loss of market share (it did not), TGIG was required to show that damages were inadequate to compensate TGIG. *Jafbros Inc.*, 109 Nev. at 928, 860 P.2d at 178; *Chateau Vegas Wine v. S. Wine & Spirits*, 127 Nev. 818, 824, 265 P.3d 680, 684 (2011). In *Chateau Vegas Wine,* an injunction was necessary to stop the ongoing interference with the plaintiff's exclusive right to import certain French wines, which damages could not cure: The defendant's failure to use adequate quality control measures compromised the quality and reputation of the wines

and the reputation of the plaintiff as the sole authorized importer. *Id.* at 829, 265 P.3d at 687.

Here, TGIG not only failed to prove that damages were inadequate, TGIG altogether failed to prove *any* damage from new RME licenses on the market. TGIG has no exclusive rights to operate RMEs in Nevada and never proved it was harmed by the licensing process.

Moreover, TGIG relies on inapposite preliminary injunction cases. *See* OB at 33-34 (citing, *e.g.*, *Barlow v. Sipes*, 744 N.E.2d 1 (Ind. Ct. App. 2001); and *Huong Que, Inc. v. Luu*, 150 Cal.App.4th 400, 418, 58 Cal.Rptr.3d 527, 541-42 (2007)). In *Luu*, for example, the plaintiff had suffered economic harm and Cal. Civ. Proc. Code § 526(a)(5) allowed for a preliminary injunction if it "would be extremely difficult to ascertain the amount of compensation." *Luu*, 150 Cal.App.4th at 418, 58 Cal.Rptr.3d at 541. No comparable statute or facts exist here.

Finally, "an injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed." *Sherman v. Clark*, 4 Nev. 138, 141 (1868). But TGIG did not seek a permanent injunction to prevent future harm. TGIG's due process claim asked for "permanent injunctive relief" for past alleged wrongs in the

form of an order issuing "the subject licenses to *Plaintiffs*" instead. 49 JPA 6040 (¶ 77) (emphasis added). In other words, TGIG sought an injunction to increase their own market share.

6. The equities also weigh against TGIG

To obtain a permanent injunction, TGIG was also required to show that "the balance of equities favors" them. *Jafbros Inc.*, 109 Nev. at 928, 860 P.2d at 178 (internal quotation marks omitted).

TGIG's Opening Brief gives this requirement short shrift because it is fatal to its request for equitable relief. OB at 39. The TGIG appellants engaged in the same conduct that they say the winning applicants engaged in: TGIG, LLC itself listed a P.O. Box on its application and failed to disclose John Ritter, TGIG, LLC's advisory board member and manager; Medifarm failed to list its thousands of shareholders and also had sales to minors; Nevada Pure had undisclosed owners; Nevada Holistic Medicine, LLC did not list its general manager and prospective manager; Herbal Choice did not disclose its investors and board members; and none of the TGIG plaintiffs proved their own applications were complete. 322 JPA 45543–47, 45645–49; 325 JPA 45727–28, 45818–19, 45827, 45845.

Thus, the balance of the equities did not weigh in favor of granting TGIG "permanent injunctive relief," let alone in the form of an order "to issue the [RME] licenses to Plaintiffs . . . ." 49 JPA 6040 (¶ 77).

D. The District Court did not err by allowing the Department to certify compliance with NRS 453D200(6)

The interpretation of a statute is a question of law that the Court reviews de novo. *Int'l Game Tech., Inc. v. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

NRS 453D.200(6) required the Department to "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." The Department was further required to adopt "before January 1, 2018, . . . all regulations necessary or convenient to carry out the provisions of this chapter" without making the operation of marijuana establishments "unreasonably impracticable." NRS 453D.200(1).

Using its authority under NRS 453D.200(1), the Department adopted a regulation providing that NAC Chapter 453D only applied to "owners of marijuana establishments . . . with an aggregate ownership interest of 5 percent or more in a marijuana establishment." NAC

453D.255(1) (hereinafter, the "5 % Rule"). The Department retained the discretion to apply NAC Chapter 453D to persons owning less than 5% if it served the public interest. NAC 453D.255(2).

1. The 5% Rule was not arbitrary or capricious

As an initial matter, the 5% Rule issue TGIG raises is moot. As explained in the Department's answering brief to the opening briefs filed by Herbal Choice, THC, and the Green Therapeutics, LLC appellants, both NRS 453D.200(6) and NAC 453D.255 have been repealed. As a result, any judicially cognizable injury redressable by prospective relief no longer exists. *See, e.g., Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972).

Moreover, and contrary to the District Court's conclusion, 333 JPA 46876, the Department's adoption of the 5% Rule was not an arbitrary or capricious violation of a constitutional requirement.

First, the Department's interpretation of NRS 453D.200(6) is entitled to deference. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). The 5% Rule was a fair interpretation of an ambiguous statute. NRS 453D.200(6) does not define the term "prospective owner," or give guidance on when and how

background checks must be performed, let alone when the applicant is a publicly traded company.

Second, the 5% Rule was a "necessary" regulation to make the operation of marijuana establishments available to all business entities—including publicly held corporations. NRS 453D.200(1). Had the Department required corporations to list all their "prospective" shareholders—including those holding 1% or less and those holding their interests through intermediaries—the Department would have made application for RME licenses "unreasonably impracticable." NRS 453D.200(1).

TGIG's expert agreed: Mr. Holyfield testified that verifying shareholders who held a 1% ownership interest or less, would be "next to impossible." 305 JPA 435004.

> Q. . . .And so is it your opinion that [] if somebody owns a 1 percent interest in a recreational marijuana company should not have to have a background check?
>
> A. Unless there's some suspicion as to why, **I don't see how you could possibly do that for every -- every shareholder**.

305 JPA 43543–44 (emphasis added).

Mr. Holyfield also agreed that the Department should not have to do new background checks and talk to shareholders each time shares changed hands, which could happen daily:

> A. No. I think in your hypothetical situation, I believe that they would be talking to the people who control the companies, not just every day. Like if I invested a thousand dollars in one of these corporations and I sold it the next day, **it would be impossible** to do that in my --it would just – wouldn't be practical. . . . .

305 JPA 43542–43 (emphasis added).

Thus, TGIG's expert agreed that the key thing was to determine the owners who controlled the company, *id*., which is precisely what the 5% Rule captured.

2. The Department's determination of compliance with NRS 453D.200(6) was not subject to judicial review

The Department—*not* the District Court or TGIG—was required to determine whether all applications were "complete and in compliance" with applicable statutes and regulations. NAC 453D.272(1); NRS 453D.210(4).

TGIG avoids the plain language of NAC 453D.272(1) and NRS 453D.210(4) and relies on cases involving administrative decisions rendered in contested cases. OB at 43 (citing, *e.g., Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994) and

State, Emp. Sec. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

But the "application process provided by NRS 453[D] does not constitute a contested case." *State, Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev. 809, 810, 407 P.3d 327, 328 (2017) ("*Samantha*"). TGIG had no right to judicial review of the Department's determination. *Id.* at 815-16, 407 P.3d at 332. Thus, the "substantial evidence" standard applicable to decisions rendered in contested cases does not apply to the Department's compliance with NRS 453D.200(6).

3. TGIG waived its right to complain about the Department's certification of compliance

Non-jurisdictional arguments that were not raised below are deemed waived and "will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). The rationale for this rule is "to prevent appellants from raising new issues on appeal" to which the respondents were unable to respond and which "the district court had no chance to intelligently consider during proceedings below." *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344-45, 905 P.2d 168, 172 (1995).

Here, at the conclusion of the preliminary injunction hearing, the Court asked the Department to certify which of the successful applicants' applications were complete with respect to the requirement to list all prospective owners. 45 JPA 5465–66. The District Court did so because it "did not have unredacted versions of the applications for all applicants . . . to make a determination." 46 JPA 5547.

The Department complied on August 21, 2019. 330 JPA 46446–48. Nevada Organic Remedies ("NOR") was one of the entities as to which the Department "could not eliminate a question" in August of 2019 as to whether NOR's application included all prospective owners. 330 JPA 46447. These entities, including NOR, were later removed from that list, when the Department eliminated the question as to their compliance. 320 JPA 45317–32.

TGIG never complained to the District Court that the Department was allowed to certify its compliance with NRS 453D.200(6). TGIG was only too happy to see NOR and three other successful applicants preliminarily enjoined to obtain final licenses. Even in its Motion for Order to Show Cause filed after trial, TGIG did not complain that the

Department was allowed to certify its own compliance. 333 JPA 46944–50.

Only now, on appeal, TGIG argues that the "*District Court* should have made [the] determination of compliance . . . based upon evidence presented to it rather than merely accepting the DOT's representations that it was in compliance." OB at 47 (emphasis added). But "an appeal is not a do-over." *Sotelo v. Bouchard*, 488 P.3d 581, 2021 WL 2432649, at *1 n.2 (Nev. 2021) (unpublished) (internal quotation marks and citation omitted). It is too late to make this argument. TGIG waived it.

4. The evidence supports the Department's recertification in 2020

When the Department notified the District Court in 2019 that it could not eliminate a question as to four applicants' compliance, the Department "expect[ed]" that these applicants "may explain why they believe they submitted complete applications in compliance with the provisions of NRS 453D.200(6)." 333 JPA 46447.

They did. *E.g.*, 48 JPA 5796–06; 49 JPA 5950–6004.

TGIG's argument that the Department offered scant evidence for removing NOR from the list of enjoined applicants is based on a selective

recitation of the hearing transcript. OB at 46. The Department's counsel went on to say:

> MR. SHEVORSKI: We had no evidence before us that could demonstrate that there were undisclosed owners. And also Mr. Gilbert had testified during the trial that NOR's ownership had been approved immediately prior to the application period. And there was no evidence that it would even be possible for NOR to submit a different application. The application was accepted.
> There was no evidence before the Court or the Department of Taxation or the CCB that NOR had not disclosed.
> And if there was, we would certainly give NOR the opportunity to cure.

343 JPA 48163.

TGIG's argument that "all the evidence is to the contrary," OB at 47, is unsupported and warrants no consideration. But even assuming NOR should have been eliminated from consideration (it should not), it would change nothing for the TGIG appellants: None of them would have placed high enough to obtain licenses and Medifarm would have to be eliminated from consideration as well. II RA 402-408; 322 JPA 45543.

E. The District Court did not abuse its discretion in denying TGIG a remedy for flaws in the licensing process.

The district court's decision to grant or deny an equitable remedy is reviewed for an abuse of discretion. *Am. Sterling Bank v. Johnny Mgmt.*

LV, Inc., 126 Nev. 423, 428, 245 P.3d 535, 538 (2010).[9] As discussed below, the District Court did not abuse its discretion in declining to issue a remedy despite identifying several flaws in the licensing process.

1. Some findings of flaws and unfairness are not supported by substantial evidence

This Court gives deference to the district court's factual findings "so long as they are supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). But at least four of the District Court's findings that TGIG cites are not supported by substantial evidence.

First, no substantial evidence supports the District Court's finding that the graders were not adequately trained or that such lack of training impacted their ability to be objective and impartial. OB at 48 (a), 50 (h); 333 JPA 46866, 46874 (¶¶ 53, 102). The graders had extensive relevant experience and received two weeks training from four Department representatives. 291 JPA 41984–85; 295 JPA 42523, 42528, 42555; 298 JPA 42697, 42814; 300 JPA 42996–97; 303 JPA 43225; III RA 525, 532; 298 JPA 42814. They received general training and hands-on training

[9] TGIG cites no legal support for its proposed "de novo" standard. OB at 50-51.

on the scoring of applications. 295 JPA 42523, 42528, 42555; 298 JPA 42697–98, 42748; 300 JPA 43006, 43030; II RA 411–474. They used mock applications to test their scoring. *Id.*; *see also*, *e.g.*, 291 JPA 41996–97; 295 JPA 42553. They were trained to use scoring tools with point ranges to guide them—some of which required mathematical formulas. 298 JPA 42711; 300 JPA 43084, 43094; II RA 475–499; III RA 500-511. The graders performed quality control. 298 JPA 42808; 299 JPA 42862; 300 JPA 43084; 303 JPA 43247. None of them had ties to the industry. 290 JPA 41780.

Not a single TGIG appellant provided evidence that *any* portion of their many applications was not scored "objectively and impartially." The TGIG appellants do not question their scores at all. OB at 8-9.

Second, no substantial evidence supports the District Court's finding that the Department made "no effort to verify owners, officers, and board members . . . ." 333 JPA 46867 (¶ 55); OB at 48(b). Only applicants already holding a medical marijuana license could apply. The Department compared the owners, officers and board members listed on the RME license applications against its agent card portal, which lists everyone who maintains an agent card and whose background has been

checked. 290 JPA 41762–65. The Department also checked pending transfers of interests. 290 JPA 41762.

Third, no evidence supports the District Court's finding that the elimination of the physical address requirement made the process unfair or frustrated the graders' ability to score certain portions of the applications. OB at 49 (e)-(f); 333 JPA 46868, 46874 (¶¶ 60, 100). Not a single grader or TGIG appellant testified to that effect. As discussed above, the physical location was not scored, and the "floor plan [including the "sink locations"], community impact, [and] security plan," which the District Court cited as being impacted by the elimination of the physical location" were always required to be submitted without identifying the proposed location—even under the original application that required the physical address. 270 JPA 38883, 38894–95; II RA 481–499; III RA 500–503.

Fourth, no evidence—let alone substantial evidence—supports the finding that a lack of a single point of contact resulted in unfairness. All applicants had already participated and received licenses in the 2014 medical marijuana licensing process and were familiar with the process. 290 JPA 41789–90. A single Department representative—Ky Plaskon—

answered an email address where applicants could email their questions. 295 JPA 42411. Ky Plaskon answered the questions without favoritism. 296 JPA 42579-42585, 42594. Not a single TGIG applicant testified that they had unanswered questions, or that they did not receive the revised application, or that they had no access to the same Department individuals they claim successful applicants had access to.

As TGIG's expert testified, the fact that TGIG did not receive licenses despite being an "ultimate insider" with direct access to the deputy director proved that the process was "working." 312 JPA 44520.

2. TGIG was not harmed by flaws in the process

TGIG provided no proof at trial how each of them was harmed by *any* of the cited flaws in the process:

> Q So . . . as you sit here, you can't identify any defect in the process that made it unfair; correct?
> A Correct.

322 JPA 45553 (Medifarm).

> Q . . . what facts do you have that Fidelis was in any way disadvantaged by the graders?
> A I don't have any facts.

325 JPA 45795 (Fidelis).

The TGIG appellants mistakenly compare themselves to the plaintiffs in *Matter of the Application for Medicinal Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC*, 465 N.J. Super. 343, 243 A.3d 688 (App. Div. 2020) ("*Pangaea Health*")—an inapposite judicial review case foreclosed by *Samantha*. OB at 52.

In *Pangaea Health*, "numerous, indisputable anomalies in the scoring of the appellants' applications prevent[ed] [the court] from having sufficient confidence in the process adopted by the Department . . . ." *Pangaea Health*, 465 N.J. Super. at 362, 243 A.3d at 699. For example, Pangaea Health received a top score from one of the graders on one criterium and a zero from another. *Id*. at 365, 243 A.3d at 700.

TGIG alleged no such scoring errors or discrepancies between the graders' scores. 267 JPA 38416–269 JPA 38867. In fact, TGIG concedes its Mandamus claim was not based on scoring errors. OB at 8-9.

TGIG offered no evidence below or on appeal—*none*—that *any* of the owners, officers, or board members of the successful applicants could not pass a background check or were not the "best candidates . . . ." OB at 51–52. Nor did TGIG offer any evidence that they were better candidates than the winning applicants.

3. TGIG benefitted from the flaws it cites

Courts must consider "the entirety of the circumstances that bear upon the equities" when deciding whether to grant equitable or declaratory relief. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp., Inc.*, 132 Nev. 49, 58, 366 P.3d 1105, 1114 (2016).

Here, the circumstances do not call for a remedy because TGIG benefitted from at least four of the eight cited flaws in the licensing process. OB at 48–50.

First, TGIG, LLC, Nevada Pure, Medifarm, and Herbal Choice did not list all owners, officers, and board members, and thus benefitted from the Department's purported failure to verify that the applications were complete. OB 48-49 (b)-(c). *E.g.*, 321 JPA 45497–99; 325 JPA 45769–71.

Second, TGIG, LLC only listed a P.O. Box and thus benefitted from the decision to eliminate the physical location requirement. OB at 49 (e). 321 JPA 45430.

Third, TGIG, THC Nevada, Herbal Choice, GBS Nevada Partners, and Fidelis had the same purported "preferred access" to the Department's deputy director. OB at 49 (g). 321 JPA 45398, 45411; 312

JPA 44595, 44631 (THC); 325 JPA 45779-82 (Herbal Choice); 310 JPA 44167–68 (GBS); 322 JPA 45598-45601 (Fidelis).

Fourth, Fidelis created a "board" despite being an LLC and benefitted from the fact that graders counted its board members for diversity points despite the purported lack of guidance. OB at 49 (d); 322 JPA 45568–70.

4. Awarding TGIG a remedy is unfair to successful applicants

When considering whether to grant declaratory relief, courts must consider "the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief." *Shadow Wood Homeowners Ass'n,* 132 Nev. at 64, 366 P.3d at 1115.

Awarding TGIG a remedy would be unfair to all the successful applicants who submitted complete applications and won on the merits of their applications. For example, defendant/respondent Deep Roots included a physical address on its applications, did not communicate with or receive alleged "inside information" from the Department, listed all its owners, and won five licenses because its team worked hard on its applications. 307 JPA 43744, 43767, 43771–73. TGIG also produced no evidence at trial that successful applicant Wellness Connection was not

deserving of the license it won in Las Vegas, 322 JPA 45537–38, 45653–54. Nor did TGIG offer any evidence that the many applicants that ranked higher than TGIG did not deserve their higher ranks.

Given all these circumstances, the District Court did not abuse its discretion in denying a remedy in the form of a do-over and denial of conditional licenses to the successful applicants. 49 JPA 6042 (¶ 85).

G. The petition for judicial review was properly denied

1. TGIG had no right to judicial review

Disappointed applicants for a recreational marijuana establishment license do "not have a right to judicial review under the APA or NRS Chapter 453[D]" because "the application process provided by NRS 453[D.210] does not constitute a contested case." *Samantha*, 133 Nev. at 810, 407 P.3d at 328.

Thus, the District Court should have disposed of TGIG's Petition for Judicial Review claim before trial and the Department filed and supplemented a 73-volume "record on review," as the Department requested. I RA 009; II RA 376–380. For this reason alone, all TGIG's arguments as to the sufficiency of the record are misplaced and should be rejected.

2. TGIG did not meet its burden of proof on its judicial review claim

Even assuming TGIG had a judicial review claim, TGIG did not overcome the statutory presumption to which the Department is entitled under NRS 233B.135 that the decision to deny their applications was "reasonable and lawful." NRS 233B.135(2). TGIG had the "burden of proof to show that the final decision [to deny their application(s)]" was "invalid under subsection 3." *Id*.

TGIG utterly failed in its burden. While complaining about the completeness of the record, TGIG never offered proof that their own applications were complete and in compliance and were wrongfully denied for licensure under any of the factors of NRS 233B.135(3). That is because TGIG submitted heavily redacted applications. 333 JPA 46837; *e.g.*, 95 JPA 13052, 13073, 13085 (GBS); 234 JPA 33889–90 (TGIG). Medifarm did not even disclose its applications, II RA 378, and NevCann and THC designated their applications as "attorney's eyes only ['AEO']," thereby precluding any review by the Court. II RA 379. The District Court thus properly rejected TGIG's judicial review claim for TGIG's failure to provide the Court with unredacted applications.

3. The District Court did not abuse its discretion to deny extra-record evidence

Even assuming TGIG had a judicial review claim and met its burden to prove that its own applications were complete and in compliance—it did not—the District Court was well within its discretion to deny TGIG's request to receive extra-record evidence.

"In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court *may* receive evidence concerning the irregularities." NRS 233B.135(1)(b) (emphasis added). "The decision to accept supplemental information is therefore within the discretion of the district court." *Minton v. Bd. of Med. Examiners*, 110 Nev. 1060, 1081, 881 P.2d 1339, 1354 (1994), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 327 P.3d 487 (2014).

None of the inapposite federal cases cited by TGIG on pages 57 through 59 of its Brief changes the discretionary standard under NRS 233B.135 or demonstrates that the District Court abused its discretion in refusing to admit extra-record evidence.

The Department gave the District Court all the documents on which the decision to deny TGIG licenses was based: the applications,

the scoring tools, and the scores. II RA 376–380; 270 JPA 38872–76. This is all the information on which the denial of their licenses was based.

The graders considered none of the (mostly unidentified) documents TGIG sought to introduce—whether directly or indirectly—in deciding whether to grant TGIG licenses. For example, the graders did not look at the successful applicant's applications when scoring TGIG's applications. OB at 54 (sub (a)). The graders did not consider: (1) "emails" or "text message[s]" about the adoption of the revised application; (2) documents related to the "approval" of the revised application; or (3) other correspondence between the Department and applicants. OB at 54-55 (sub (b)-(f)). *E.g.*, 299 JPA 42892 ("we did not at the time we were reviewing . . . and scoring an application have access to outside resources . . ."); 299 JPA 42896 ("I don't recall ever having emails included in any of the applications").

For these reasons, all TGIG's arguments should be rejected, and the Decision on Phase 1 affirmed in its entirety.

VII. CONCLUSION

TGIG lacked standing and did not meet its burden of proof below. The District Court did not abuse its discretion in denying relief in Phase 1 and in denying most relief requested in Phase 2. The orders below should be affirmed. In the alternative, the Court should dismiss TGIG's appeal for lack of justiciability.

Dated this 29th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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

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2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of March, 2022.

AARON D. FORD
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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/ L. Combs
Lucas Combs, an employee of the
Office of the Nevada Attorney General