IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION TGIG, LLC; NEVADA HOLISITIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; THC NEVADA, LLC; HERBAL CHOICE, INC.; RED EARTH LLC; NEVCANN LLC, GREEN THERAPEUTICS LLC; AND GREAN LEAF FARMS HOLDINGS LLC, Appellants/Cross-Respondents, vs. THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TAXATION, Respondent/Cross-Appellant, and INTEGRAL ASSOCIATES, LLC D/B/A ESSENCE CANNABIS DISPENSARIES; ESSENCE TROPICANA, LLC; ESSENCE HENDERSON, LLC AND LONE MOUNTAIN PARTNERS, LLC, Cross-Respondents.	Supreme Court Case No.: 82014 District Court Case No.: A787004

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

I. Appellants Have Standing to Challenge the Department's Licensing Process

The question of standing rests on whether the party seeking relief has a sufficient interest in the litigation. *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016)(internal citations omitted). "The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party." *Id.* (internal citations omitted).

Generally, a party must show an individual injury and not merely a general interest that is common to all members of the public. *Id.* (internal citations omitted). An issue of standing is moot when at least some of the appellants have standing. *See Deal v. 999 Lakeshore Ass'n,* 94 Nev. 301, 304-05, 579 P.2d 775, 777-78 (1978) (concluding that standing was not at issue after having determined that at least some of the parties who brought the claim had standing). The United States Supreme Court noted in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 12 S.Ct. 2130, (1992):

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. **Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.**

Miller v. Warden, 112 Nev. 930, 936 n.4 (Nev. 1996)(internal citations omitted) (emphasis added).

Here, THC Nevada, LLC and Herbal Choice, Inc. (collectively "Appellants") asserted that the right to a retail marijuana license under a statutory scheme with limited discretion, and under impartial and numerically scored competitive bidding process, constitutes a protectable property interest under the Nevada and United States Constitutions. More specifically, because NRS 453D.210 mandated that the Department of Taxation ("DOT" or "Department") issue a retail license to an applicant where a lesser number of *complete* applications are submitted than the statutory cap on the number of licenses for a particular county, Appellants possess a cognizable property interest. Here, the 2018 retail dispensary application process was only available to those individuals/entities that had already successfully obtained a medical marijuana establishment registration certificate(s). NAC 453D.268 (Vol. 333 JPA 046858). Thus, the right to apply was not common to all members of the public.

When the DOT proceeded to accept incomplete applications as "complete", Appellants were therefore deprived of an impartial and numerically scored competitive bidding process. As such, Appellants have suffered an injury in fact that is not merely conjectural or hypothetical. The fact that the DOT accepted incomplete applications and deemed them "complete" caused injury to the Appellants as they were unfairly deprived of an impartial grading system. *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). And like this Court recognized in *Miller v. Warden*, it is not necessary that one establish with certainty that the complained of activity will absolutely impact the end result, it is sufficient for the Appellants to show that they have been denied the opportunity to have their privileged applications considered on the merits. *Miller v. Warden*, 112 Nev. 930, 936 n.4 (Nev. 1996).

II. Mootness Does Not Apply When The Statutes At Issue Were Repealed In Response to An Adverse Judicial Decision

Respondents, wanting to give this Court another "easy out" to avoid a decision on the merits, argue that because the Nevada legislature repealed NRS 453D.200(6) and created the Cannabis Compliance Board, who then repealed NAC 453D.255(1), Appellants' arguments on the unconstitutionality of that regulation is moot. However, other courts have addressed this issue – when the law is changed due to a negative district court ruling (like the preliminary injunction herein) – and determined that the appeal is not generally moot. *See Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 903 F.3d 829 (9th Cir. 2018) stating:

> We have largely adhered to the rule set forth in *City of Mesquite* , explaining that where a change in the law is prompted by an adverse district court ruling, an appeal is generally not moot. *See, e.g.* , *Thalheimer v. City of San Diego* , 645 F.3d 1109, 1125(9th Cir. 2011) (case not moot where the city adopted a new law "in

> direct response to the district court's" judgment); *Jacobus v. Alaska* , 338 F.3d 1095, 1103 (9th Cir. 2003) (explaining that a case is unlikely to be moot because the state legislature repealed statutory provisions "in response to the district court's judgment"); *Carreras* , 768 F.2d at 1047 ; *see also Smith v. Univ. of Washington* , 233 F.3d 1188, 1194(9th Cir. 2000) (explaining that a case is less likely to be moot where a legislative change occurs "because of the prodding effect of [ ] litigation"); *cf. Coral Constr.* , 941 F.2d at 928 (sufficient to show that county would have the *power* to reenact an ordinance in light of a district court's judgment to defeat mootness); *but see Log Cabin Republicans v. United States* , 658 F.3d 1162, 1166 (9th Cir. 2011) (case moot where legislative change was likely in response to adverse district court judgment).

Thus, while the Respondents would like to easily dismiss and, therefore, bury the gross errors and abject process why which the DOT awarded coveted multi-million-dollar licenses, the Court should not sanction such arguments of purported mootness when the purported "mootness" was nothing more than continued attempts by the DOT to wash away its failures.

III. The Department Impermissibly Violated The Law When It Accepted and Ranked Incomplete Applications

NRS 453D.210(5)(b) which specifically provides:

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

The plain unambiguous language of NRS 453D.210(5)(b) proscribes that the DOT *shall approve if a* completed license application includes a physical address. The DOT takes the ridiculous position that "[T]he language in the statute, i.e., "shall approve" in no way limits the Departments ability to accept applications that did not list a physical address." *See* DOT's Answering Brief at 31. This logic flies in the face of the express language of NRS 453D requiring the DOT to approve ***only*** complete license applications, which expressly required providing a physical location. NRS 453D.200(2), NRS 210(4)-(5); NAC 453D.272(1). The DOT had no authority to approve applications that were incomplete (i.e., that did not list a physical address in which it will operate the proposed marijuana establishment).

IV. THC NV Was Denied Equal Protection Under the Law When It Was Treated Differently (With No Rational Basis) From Other Applicants In Regard to the Representation of Information on Its License Application

The DOT asserts that THC Nevada is pursuing an appeal on a claim that it did not plead. *See* DOT's Answering Brief at 37. THC Nevada did assert violation of equal protection as a claim; however, even assuming that the unique specifics of THC Nevada's claim were not detailed in the factual allegations in its Complaint, "when an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." NRCP 15(b)(2). Thus, as THC Nevada tried its specific issue of its claim for violation of

equal protection via implied consent, it shall be treated as if raised in the pleadings. *Id.*

The DOT accepted and rewarded applicants in the recreational dispensary application process who misrepresented information on their application. (Vol. 312 JPA 044594; 044609). And conversely, when there was deemed to be a misrepresentation on THC Nevada's application for a distribution license, THC Nevada's application was not only denied, but THC Nevada was fined and disciplined. (Vol. 312 JPA 044600-044601). There was no rational basis provided by the Department that substantiated the difference in this treatment. Thus, THC Nevada has shown by the preponderance of the evidence that it was intentionally treated differently from others similarly situated, and therefore been deprived of equal protection under the law.

CONCLUSION

The DOT maintains that it essentially can do essentially whatever it wants with regard to the issuance and/or governance of marijuana licenses and there are no repercussions. The events over the past four years have reinforced this mindset as the DOT has been able to arbitrarily award licenses; arbitrarily sanction or otherwise deprive other license holders; and subsequent change its rule and regulations as it sees fit in order to avoid any real accountability for its actions. The Appellants are pursuing their appeals in order to put a stop to this unbridled governmental abuse. The judicial branch is to serve as the impartial backstop of checks and balances to instill confidence in the people of the State of Nevada that there is uniformity and fairness in applying and upholding of the laws. Therefore, the Appellants are seeking relief from this Court to reverse the rulings below and remand to the district court accordingly. Appellants herein also join into the other Reply Briefs filed by the remaining Appellants.

DATED this 30th day of November, 2022

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CERTIFICATE OF COMPLIANCE

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

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

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

in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2022

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CERTIFICATE OF SERVICE

The undersigned, an employee of SUGDEN LAW, hereby certified that on the 1st day of December, 2022, she served a true and correct copy of the foregoing, **APPELLANTS THC NEVADA, LLC AND HERBAL CHOICE, INC.'S' REPLY BRIEF**, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: December 1, 2022

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