

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA BOARD
OF PHARMACY, A PUBLIC ENTITY
IN THE STATE OF NEVADA,

Appellant,

v.
CANNABIS EQUITY AND
INCLUSION COMMUNITY (CEIC),
A DOMESTIC NONPROFIT
CORPORATION; AND ANTOINE
POOLE, AN INDIVIDUAL,

Respondent.

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CASE NO: 85756 c/w 86128

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT
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**BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT
NEVADA DISTRICT ATTORNEY’S ASSOCIATION**

The Nevada District Attorney’s Association (“NDAA”) is an organization comprised of 17 elected district attorneys through the State of Nevada. NDAA’s mission is to share information and ideas, and to develop strategies to improve Nevada’s criminal justice process. The NDAA also monitors and evaluates legislative and judicial proposals, advocating in favor of those that have a positive impact on public safety and victims’ rights.

ARGUMENT

1. The district court erred in prohibiting the Nevada Board of Pharmacy from exercising its authority to schedule marijuana

The district court ruled that the Nevada Board of Pharmacy (hereinafter “Board”) acted outside of its authority when it scheduled marijuana as a controlled

substance. While an entirely separate conversation is possible regarding where marijuana appropriately belongs on the schedule of controlled substances, the district court erred when it ruled that the Board had no authority to classify marijuana based upon the adoption of Article IV, Section 38 of the Nevada Constitution which allows for medical use marijuana and Title 56 of the Nevada Revised Statutes (NRS Chapter 678A), which concerns the limited legalization and regulation of cannabis for both medical and recreational purposes.

Article IV, Section 38 requires that the legislature implement laws for the allowance of cannabis for medical purposes. However, the existence of this provision to the Constitution did not mean the abolition of all laws or regulations related to cannabis. While allowing for use in prescription of cannabis, multiple provisions in Section 38 focus on the continued regulation of this drug. Subsection 1(b) allows for restrictions on cannabis use for minors. Subsection 1(c) allows for the forfeiture of the plant if possessed by someone not authorized to possess medical cannabis. Subsection 1(d) provides for a registry of patients that have been authorized to use medical cannabis. Finally, subsection 2(a) specifically indicates that Article 4, Section 38 does not authorize “the use or possession of the plant for a purpose other than medical or use for a medical purpose in public.” Thus even with the allowance cannabis use, the legislature is still tasked with implementing the regulation of the drug.

The same is true of Title 56, which pertains to various laws relating to the use and sale of cannabis. The passage of laws that allowed for recreational and medical cannabis use did not strip the Board of its ability to reasonably regulate the drug. NRS 678A.005 is the legislature’s declaration that cannabis should be legalized; however, its declaration is subject to the recognition that cannabis use must still be regulated. For instance, NRS 678A.005(2)(f) seeks that “[T]he cannabis industry is free from criminal and corruptive elements.” Subsection 3 of the same statute recognizes that public trust and confidence can only be maintained by “strict regulation of all persons, locations, practices, associations and activities related to the operation of cannabis establishments.” Finally, subsection 4 requires that “[A]ll cannabis establishments and cannabis establishment agents must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of inhabitants of the State.”

Pursuant to NRS 453.146, the legislature has conferred the Board with the responsibility for classifying controlled substances. Chapter 453 contains the definitions and provisions for the enforcement of controlled substances. Chapter 453 is also known as the Uniform Controlled Substance Act. The first statute listed in Chapter 453 is NRS 453.005, “Applicability of chapter to medical use of cannabis.” Notably, the legislature specially targeted medical use of cannabis here. In it NRS 453.005 states that the “provisions of this chapter do not apply to the extent they are

inconsistent with the provisions of Title 56 of the NRS.” Therefore NRS 453.005 recognized that certain acts, which would normally be prohibited are not illegal if they are otherwise protected by Title 56.

Chapter 453 then proceeds to provide a list of definitions. Included for instance in the definitions even after the passage of Title 56 are the meanings of substances like “CBD,” “concentrated cannabis,” and “marijuana.” NRS 453.033; NRS 453.042; NRS 453.096. Aside from marijuana itself, CBD and concentrated cannabis both are defined as substances that use compounds derived from marijuana. This was yet another opportunity for the legislature to eliminate marijuana altogether from Chapter 453, but the legislature did not take action to eliminate these and other provisions from the Uniform Controlled Substances Act.

In addition to the definitions listed in Chapter 453 regarding marijuana and its related products, the legislature has granted the Board with the authority to add, delete, reschedule controlled substances. NRS 453.146(1). The Board shall consider factors such as the potential, history and current patterns of abuse, risk to public health, and state of current scientific knowledge. NRS 453.146(2). Additionally, the Board may “consider findings of the federal Food and Drug Administration or the Drug Enforcement Administration as prima facie evidence relating to one or more of the determinative factors.” NRS 453.146(3). Just because the Board has designated a substance under a certain schedule does not make the decision

permanent either. Rather, the Legislature has ordered that the Board shall review the schedules annually. NRS 453.211.

The legislature has also provided additional guidance for the various schedules of narcotics. The Board is required to schedule controlled substances pursuant to the tests articulated between NRS 453.166 to NRS 453.206, which specifies the criteria for schedules I through V.

At the time that the district court decided this case, the Board still had marijuana on its list of schedule I substances. A schedule I drug is one that “1. Has high potential for abuse; and 2. Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.” NRS 453.166. The Board may recognize the findings of the FDA and DEA as prima facie evidence that marijuana does not have an accepted medical purpose in the United States. The Drug Enforcement Administration (the “DEA”) classifies marijuana as a Schedule One Controlled Substance. *Drug Fact Sheet: Marijuana/Cannabis*, DEPT. OF JUSTICE/DRUG ENFORCEMENT ADMINISTRATION (April 2020), https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf. In April of 2020, the DEA explained its rationale for this classification. Id. The DEA noted that although some states have found a medicinal purpose of marijuana, recognition of medical use is ultimately the decision of the U.S. Food and

Drug Administration (the “FDA”). Id. The FDA has not recognized a foundation for approving the drug for medicinal use in the United States. Id.

Thus, the Board had a legitimate basis to place marijuana as a schedule I controlled substance by following the FDA and DEA scheduling of narcotics. If there were a disagreement with how marijuana is scheduled, then one could challenge the Board’s scheduling of the drug pursuant to NRS 453.166 to NRS 453.206, and the Board’s requirement that it support its findings. NRS 453.146(4); NRS 453.211. This, however, should be a separate and distinct challenge to the scheduling of marijuana. Even if a court were to rule that the Board erred in how it scheduled marijuana, it does follow that the Board should be stripped in its entirety its responsibility to schedule drugs, including marijuana.

The Board did not act arbitrarily or capriciously in placing marijuana as a schedule I drug for the reasons listed above. Marijuana still has the potential for abuse and possibly leading to psychological or physical dependence. The recency of marijuana laws makes it difficult to currently determine where marijuana should be classified. However, the NDAA fully supports the Board’s ability to ultimately determine where marijuana should be scheduled.

It was absolute error for the district court to strip the Board of any authority to regulate a drug that is clearly listed in Chapter 453 as a controlled substance. As stated above, even with the legalization of marijuana, the legislature maintained that

regulation and enforcement is still necessary. The legislature could have removed the Board's authority to classify marijuana, but it did not do that. Moreover, it did not remove marijuana and its related products from Chapter 453 despite recognizing that Article 4, Section 38 and Title 56 both provided for some legalization of marijuana.

Yet despite the passage of these marijuana laws, the legislature chose not to eliminate marijuana from Chapter 453, and it continued to leave the scheduling of narcotics to the Board. Contrary to the district court's order, the passage of laws did not alter the Board's duties and authority over its scheduling of controlled substances. Again NRS 453.005 recognized that there could be some potential overlapping between Title 56 and Chapter 453, but it did nothing to remove any provisions because it wanted to leave the Board with authority to schedule controlled substances, even marijuana.

2. The Board's need to schedule marijuana is important for public safety

The passage of both medical and non-medical cannabis use has certainly altered how the drug is treated in this state, but the passage of legal and responsible marijuana use still requires the enforcement of illicit marijuana sales pursuant to Chapter 453 of the Nevada Revised Statutes. Enforcement of existing drug laws, while understanding that certain possession is allowed, is necessary for maintaining the integrity of legalized cannabis. Otherwise individuals that bypass regulations

would be free to sell and transport unregulated marijuana without any repercussion. Such sales would hurt not only the legalized cannabis establishments, but they also affect the safety of the product for consumers that may opt to buy from an unlicensed grower or seller. Moreover, even since the passage of legalized marijuana, incidences of violence between illicit sellers and the robberies that have occurred due to the cash on hand is still all too common. Thus with these issues in mind, the regulation of marijuana as a controlled substance is still necessary.

The law related to unlawfully selling controlled substances only applies to those that are scheduled by the Board. NRS 453.321. Similarly, those who possess narcotics for the purposes of sale are only affected by possessing scheduled substances. NRS 453.337. An individual who chooses to unlawfully possess for the purpose of selling or selling unregulated and unsanctioned marijuana would not be held accountable if the Board were unable to schedule it as a controlled substance.

Maintaining public safety requires adherence to the detailed regulations provided by the legislature concerning the control of marijuana. These regulations can only be properly enforced if marijuana remains a scheduled controlled substance. *See generally* NRS 678B; NRS 453.336.

The legislature has provided Nevadans with access to marijuana in a controlled setting. However, the legislature remains committed to public safety. To balance these interests, the legislature has provided a legal avenue for attaining

marijuana while also setting forth regulations to ensure safety surrounding control of the drug. These regulations are enforced through the criminal statutes concerning possession and sale of scheduled controlled substances. The statutes do not target those who lawfully use marijuana both recreationally and medicinally. They are simply allow government agencies to monitor scheduled substances which present a risk to the community.

Like any substance with a potential for abuse, Nevada agencies must continue to ensure that consumption remains safe. Safety is more likely ensured through the continued licensing of dispensaries, rather than the risky endeavor of trusting those who sell marijuana on the street without regard for their customers. Cannabis.net, *Wait, Should I Buy Weed from My Dealer or That New Dispensary on the Block?*, BENZIGA (Aug. 24, 2022, 8:42 AM), <https://www.benzinga.com/markets/cannabis/22/08/28604868/cn-wait-should-i-buy-weed-from-my-dealer-or-that-new-dispensary-on-the-block>.

Similar to most products sold in a licensed business, dispensaries provide verified information regarding source and contents of the drug. This ensures safety and transparency for consumers. An end to such regulations would create an unsafe market, as consumers would have no means to assess the risk of consumption.

Licensed businesses appreciate the risks involved with the controlled substance and how mishandling might affect them. As such, they handle it with care.

Unregulated sellers do not share the same sentiment and would likely be inclined to extend this indifference if prosecutors do not have an avenue to control the issue.

These regulations allow the government to protect the easily manipulated substance from potential tampering, as discussed earlier. Because of the dangerous risk of alteration, regulating the control of marijuana is of paramount importance to public safety. Maintaining a healthy monitoring position is only possible if possession of a controlled substance remains applicable to marijuana.

Declassification would simply leave Nevadans without even the protections that surround the handling of alcohol. In other words, Nevadans would be left with a set of regulations that do not have an independent provision for prosecution. Marijuana must remain a scheduled controlled substance so that law enforcement agencies can reasonably enforce the many safeguards in place for legalized marijuana, and to prevent the criminal element from ignoring the legislature's statutory framework for legalized marijuana.

3. Why should marijuana remain classified as a controlled substance?

In addition for the need to enforce the laws, marijuana still deserves attention as a scheduled controlled substance. Following a determination of medical use, government agencies including the Board and the FDA must consider the potential for abuse and general health concerns. NRS 453.166. As previously discussed, the Nevada legislature has provided guidance concerning such determinations. NRS

453.146(2). This guidance includes factors concerning current scientific findings of the substance. NRS 453.146(2)(b-c).

Current research suggests that the use of marijuana can lead to a variety of health concerns. Daniel G. Orenstein, *Nowhere to Now, Where? Reconciling Public Cannabis Use in a Public Health Legal Framework*, 126 PENN ST. L. REV. 59, 84 (2021). The use of marijuana is also an addictive behavior. *Marijuana and Public Health: Addiction*, CTR. FOR DISEASE CONTROL AND PREVENTION (Oct. 19, 2020), <https://www.cdc.gov/marijuana/health-effects/addiction.html> [hereinafter “CDC”]. Thus, the Board may reasonably conclude that the potential abuse of marijuana is high, especially when taking both its health risks and addictive nature into consideration.

This conclusion is made with the research available today. The CDC has provided caution that although current research suggests a public risk regarding marijuana, further risks may be discovered as research continues. *Id.* Therefore, public health concerns strongly support regulation of marijuana until research can prove otherwise.

The lack of scientific evidence supporting less restrictions on marijuana also indicates why the substance must remain controlled unlike similarly associated substances like alcohol. The characteristics of alcohol have been determined through decades of research, while the full nature of marijuana remains unknown. Wayne

Hall, *Alcohol and Cannabis: Comparing Their Adverse Health Effects and Regulatory Regimes*, 42 INT'L. J. DRUG POL'Y. 57, 57-59 (2017). Research on alcohol also sets forth an understanding of the duration of impairment on individuals, while the effects of marijuana on the mind and body are not concrete. Id.

A decision to treat marijuana like alcohol simply ignores their inherent differences. This position is not solely rested on the obvious lack of research regarding adverse health effects, but also the different potential for abuse. Unlike alcohol, marijuana has the potential for lethal alterations.

The lacing of marijuana with incredibly dangerous substances like fentanyl is an increasing occurrence. Hao Wang et al., *Rapid SERS Quantification of Trace Fentanyl Laced in Recreational Drugs with a Portable Raman Module*, 93 Analytical Chemistry 9373, 9373 (2021). Monitoring this epidemic of risk to public health should be of paramount concern to all government entities. Scheduling marijuana aids the important cause of protecting citizens from this risk by the inherent requirement of regulation. A movement toward declassifying would simply put the drug in open hands that may already be holding other controlled substances.

To abandon the scheduling of marijuana possesses risks to our adolescent community in addition to the potential for lacing due to the inherent potential rise in availability. It is commonly known that adolescent brain development can be severely affected by many substances. Nora D. Volkow, M.D. et al., *Adverse Health*

Effects of Marijuana Use, 370 NEW ENG. J. MED. 2219, 2219-20 (2014). Marijuana has been confirmed through medical studies as an adverse influence on the development of an adolescent's brain. Id. at 2220.

The effects of marijuana on the development of adolescents does not end with an impairment of the mind. The use and eventual addiction to marijuana creates a higher risk for abuse of many other drugs through the learned behavior of addiction. Id. at 2220-21. Additionally, it can create an increased risk of mental illness. Id. at 2221.

With these many concerns in mind, it is important for the Board to maintain authority over the scheduling of marijuana. The Board is not only tasked with this authority by the legislature, but it is also in the best position to review the literature on marijuana use as it becomes more available. Furthermore, the Board's requirement to review the schedules on an annual basis puts it in an advantageous place to modify its scheduling of marijuana as needed. However, to remove marijuana from the list of scheduled substances threatens to legalize marijuana beyond what the legislature ever intended, and the risks of doing so are simply too great.

CONCLUSION

The NDAA respectfully requests that the district court's order be vacated.

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Dated this 5th day of September, 2023.

Respectfully submitted,

BY */s/ Alexander Chen*

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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 2003 in 14 point font of the Times New Roman style.
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 proportionately spaced, has a typeface of 14 points or more, contains 2,829 words and 13 pages.
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 5th day of September, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 5, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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