



1 **MDSM**

2 BRETT KANDT (Bar No. 5384)

3 General Counsel

4 [bkandt@pharmacy.nv.gov](mailto:bkandt@pharmacy.nv.gov)

5 PETER K. KEEGAN (Bar No. 12237)

6 Assistant General Counsel

7 [p.keegan@pharmacy.nv.gov](mailto:p.keegan@pharmacy.nv.gov)

8 Nevada State Board of Pharmacy

9 985 Damonte Ranch Parkway – Suite 206

10 Reno, NV 89521

11 775.850.1440 – Telephone

12 *Attorneys for Respondent/Defendant*

13  
14  
15 **DISTRICT COURT OF**  
16  
17 **CLARK COUNTY, NEVADA**

18 CANNABIS EQUITY AND INCLUSION  
19 COMMUNITY (CEIC), a domestic  
20 nonprofit corporation; ANTOINE POOLE,  
21 an individual,

22 Petitioners/Plaintiffs,

23 vs.

24 STATE OF NEVADA ex rel. BOARD OF  
25 PHARMACY, a public entity of the State  
26 of Nevada

27 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

HEARING REQUESTED

28  
**RESPONDENT/DEFENDANT’S MOTION TO DISMISS FOR LACK OF**  
**JURISDICTION AND FAILURE TO STATE A CLAIM**

Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant General Counsel, hereby submits this motion to dismiss Petitioners/Plaintiffs Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This motion is made pursuant to NRC 12(b)(1) and (b)(5) and based upon the following points and authorities and the papers and pleadings on file herein.

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that the foregoing motion will be heard before the above-  
3 captioned Court on \_\_\_\_, 2022, at \_\_\_\_ a.m./p.m.

4 By: /s/ Brett Kandt  
5 Brett Kandt (Bar No. 5384)  
6 General Counsel  
7 Peter K. Keegan (Bar. No. 12237)  
8 Assistant General Counsel  
9 *Attorneys for Respondent/Defendant*  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole  
3 come to the Court seeking declaratory, injunctive and writ relief alleging that the deletion  
4 of marijuana, cannabis and cannabis derivatives (hereinafter “marijuana”) from the list of  
5 Schedule 1 controlled substances is mandated by passage of the *Nevada Medical Marijuana*  
6 *Initiative*,<sup>1</sup> Nev. Const. art. IV, § 38, and the *Nevada Marijuana Legalization Initiative*,<sup>2</sup>  
7 initially codified as the Regulation and Taxation of Marijuana Act (“Act”), NRS Chapter  
8 453D.

9 This case should be dismissed pursuant to NRCP 12(b)(1) and (b)(5), because  
10 Plaintiffs lack standing to challenge the current scheduling of marijuana in NAC 453.510,  
11 and Plaintiffs have not set forth any remediable claims insofar as the current scheduling  
12 of marijuana is lawful.

13 **I. BACKGROUND**

14 For decades, marijuana has been listed as a Schedule I controlled substance under  
15 both the Federal Controlled Substances Act, 21 U.S. Code Chapter 13, and the Nevada  
16 Uniform Controlled Substances Act, NRS Chapter 453. The *Nevada Medical Marijuana*  
17 *Initiative* authorized the medical use of marijuana under limited circumstances and subject  
18 to significant restrictions. The initiative was implemented by passage of Assembly Bill No.  
19 453 in the 2001 Legislative Session, codified as NRS Chapter 453A. The *Nevada*  
20 *Marijuana Legalization Initiative*, codified as NRS Chapter 453D, authorized the  
21 regulation and taxation of marijuana for adult recreational use under limited  
22 circumstances and subject to significant restrictions. By passage of Assembly Bill No. 533  
23 in the 2019 Legislative Session, NRS Chapters 453A and 453D were repealed and replaced  
24 in their entirety by Title 56 of the Nevada Revised Statutes. Certain acts falling within  
25 the narrow confines of either NRS Chapter 678C (Medical Use of Cannabis) or NRS  
26

---

27 <sup>1</sup> Ballot Question No. 9, 1998 and 2000.

28 <sup>2</sup> 2016 initiative petition, Ballot Question No. 2.

1 Chapter 678D (Adult Use of Cannabis) are exempt from State prosecution; otherwise,  
2 marijuana remains an illegal substance under State law.

## 3 **II. LEGAL STANDARD**

4 “To survive dismissal, a complaint must contain some set of facts, which, if true,  
5 would entitle [the plaintiff] to relief.” *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127  
6 Nev. 196, 211, 252 P.3d 681, 692 (2011) (quotation marks omitted). The court must accept  
7 the factual allegations of the Petition as true and draw all inferences in favor of Plaintiffs.  
8 *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

## 9 **III. ARGUMENT**

### 10 **A. This Court lacks jurisdiction because the Plaintiffs lack standing.**

11 “Standing is the legal right to set judicial machinery in motion.” *Heller v. Legislature*  
12 *of State of Nevada*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quotation marks omitted).  
13 It is a jurisdictional requirement. *Id.* at 461, 93 P.3d at 749. Questions of standing can be  
14 fatal to an action as they implicate the Court’s subject matter jurisdiction.

15 Where the Legislature has not provided a statutory right to seek relief, the Nevada  
16 Supreme Court has long required "an actual justiciable controversy as a predicate to  
17 judicial relief." *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385,  
18 393, 135 P.3d 220, 225 (2006) (internal quotation marks omitted), abrogated on other  
19 grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. at 227-28, 181 P.3d at 672.  
20 *See also Kahn*, 127 Nev. at 213, 252 P.3d at 694, citing *Doe v. Bryan*, 102 Nev. 523, 525,  
21 728 P.2d 443, 444 (1986). To demonstrate an actual controversy, a litigant must satisfy  
22 the "standing requirements of injury, causation, and redressability." *Stockmeier*, 122 Nev.  
23 at 392, 135 P.2d at 225 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112  
24 S.Ct. 2130 (1992) .

25 Plaintiff Poole alleges he was convicted of a Category E felony for possession of  
26 marijuana under NRS 453.336 over 5 years ago.<sup>3</sup> Petition at 4:1-7 (¶1). Deleting marijuana

---

27 <sup>3</sup> NRS 453.336(4) imposes criminal penalties for the possession of 1 ounce or less of  
28 marijuana not obtained lawfully pursuant to the provisions of title 56 of NRS.

1 as a Schedule 1 controlled substance at this time will do nothing to nullify his conviction.  
2 Moreover, Poole has failed to even articulate in the Petition *when* the acts that resulted in  
3 his conviction occurred or *how* those acts were somehow exempt from State prosecution as  
4 a result of either ballot initiative.<sup>4</sup> Poole lacks standing as he cannot demonstrate how a  
5 favorable ruling would redress any injury. *See Lujan*, 504 U.S. at 560-61. “The injury must  
6 ‘fairly traceable’ to the conduct at issue.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*  
7 *(TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 704 (2000) (citing *Lujan, supra.*).

8 Plaintiff CEIC argues that it has both organizational and associational standing but  
9 fails to plead the essential elements of either. To establish organizational standing CEIC  
10 must show that the challenged conduct frustrated its organizational mission and that it  
11 diverted resources to combat that conduct. *Friends of the Earth v. Sanderson Farms, Inc.*,  
12 992 F.3d 939, 942 (9th Cir. 2021). CEIC alleges a disjointed, two-fold mission: “supporting  
13 people from underrepresented communities as they apply for licenses to participate in the  
14 legal cannabis market” on the one hand, and “assisting individuals with prior cannabis-  
15 related criminal convictions in applying for pardons and sealing criminal records” on the  
16 other. Petition at 3:16-26 (¶1). This represents “business as usual” for CEIC, as it cannot  
17 demonstrate how either prong of its mission has been frustrated as a direct result of  
18 marijuana remaining a Schedule I controlled substance after passage of the ballot  
19 initiatives. *Friends of the Earth*, 992 F.3d 942-43. CEIC cannot manifest a “concrete and  
20 demonstrable injury to its activities – with the consequent drain on the organization’s  
21 resources – that constitute[s] far more than simply a setback to the organization’s abstract  
22 social interests.” *Am. Diabetes Ass’n v. United States Dep’t of the Army*, 938 F.3d 1147,  
23 1154 (9th Cir. 2019) (citations omitted).

24 CEIC has likewise failed to demonstrate the elements of associational standing as  
25 articulated by the U.S. Supreme Court:

26 An association has standing to bring suit on behalf of its members when its  
27 members would otherwise have standing to sue in their own right, the

---

28 <sup>4</sup> Nor does explain why he did not take advantage of the marijuana pre-trial  
diversion program under NRS 453.3363.

1 interests at stake are germane to the organization's purpose, and neither the  
2 claim asserted nor the relief requested requires the participation of individual  
members in the lawsuit.

3 *Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. at 704 (citations omitted). “The ultimate  
4 consideration when determining whether an organization has associational standing is  
5 whether it has a "personal stake in the outcome of the controversy.” *Am. Unites for Kids v.*  
6 *Rousseau*, 985 F.3d 1075, 1097 (9th Cir. 2021) (citations omitted); *see also Donald J. Trump*  
7 *for President v. Cegavske*, 488 F. Supp. 3d 993, 999 (D. Nev. 2020).

8 The Petition utterly fails to specify how “people from underrepresented  
9 communities” applying “for licenses to participate in the legal cannabis market” have a  
10 personal stake in deleting marijuana as a Schedule 1 controlled substance.

11 Additionally, as with Plaintiff Poole, descheduling marijuana at this time will have  
12 no beneficial impact upon those CEIC members with prior cannabis-related criminal  
13 convictions, who must continue to pursue pardons and/or sealing conviction records. The  
14 Board does not exercise any of the functions in the criminal justice system that the Petition  
15 seeks to impact; it has no role in arrests, prosecutions, pardons or sealing conviction  
16 records. *See, e.g., Ctr. for Biological Diversity v. Exp.-Import Bank of the United States*,  
17 894 F.3d 1005, 1013 (9th Cir. 2018) (plaintiff must establish that the requested relief could  
18 alter third-party conduct in a way that redresses the injury).

19 The Petition’s lack of redressability in this regard is further evidenced in that, even  
20 if it was not listed as a controlled substance, the unlawful possession, trafficking or  
21 production of marijuana still remains a crime under NRS 453.336(4), NRS 453.339 and  
22 NRS 453.3393, respectively. The prohibited acts in those statutes are the possession,  
23 trafficking or production of marijuana, *not* of a controlled substance. By virtue of the lack  
24 of redressability, CEIC can satisfy none of the three prongs of associational standing.

25 Plaintiffs are not entitled to declaratory, injunctive or writ relief due to their lack of  
26 standing. They cannot establish a beneficial interest sufficient to pursue a mandamus  
27 action since they will gain no direct benefit from issuance of a writ and suffer no direct  
28 detriment if it is denied. *Heller*, 120 Nev. at 461, 93 P.3d at 750 (citations omitted). They

1 cannot establish either a justiciable controversy or a legally protectable interest as required  
2 to obtain declaratory relief. *See UMC Physicians' Bargaining Unit of Nev. Serv. Emples.*  
3 *Union, SEIU Local 1107 v. Nev. Serv. Emples. Union/SEIU Local 1107*, 124 Nev. 84, 92-  
4 94, 178 P.3d 709, 714-16 (2008). Finally, “Plaintiffs lack standing to pursue injunctive  
5 relief where they are unable to establish a ‘real or immediate threat’ of injury.” *Nicosia v.*  
6 *Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citing *Los Angeles v. Lyons*, 461 U.S.  
7 95, 111-12, 103 S. Ct. 1660, 1670 (1983)). Plaintiffs’ claims must be dismissed due to their  
8 lack of standing.

9           **B. The Petition fails to state a claim because the current scheduling of**  
10           **marijuana is lawful.**

11           Plaintiffs’ core argument is that the marijuana cannot remain a Schedule I  
12 controlled substance after passage of the ballot initiatives. Both the premise and the  
13 conclusion of that argument are wrong.

14           **1. Nothing in the express language of either ballot initiative**  
15           **compels the deletion of marijuana from NAC 453.510.**

16           Although the proponents of either ballot initiative could have squarely addressed  
17 the deletion of marijuana as a Schedule I controlled substance, both initiatives are silent  
18 on the subject. To the contrary, both initiatives are framed to account for and distinguish  
19 between the lawful and unlawful use of marijuana.

20           Subsection 2(a) of the *Nevada Medical Marijuana Initiative* states that Section 38  
21 does not “[a]uthorize the use or possession of the [cannabis] plant for a purpose other than  
22 medical or use for a medical purpose in public.” The implementing legislation subsequently  
23 delineated the lawful acts that are exempt from State prosecution and other acts that are  
24 not exempt.<sup>5</sup>

25           Section 4 of the *Nevada Marijuana Legalization Initiative* (initially codified as NRS  
26 453D.100) specified that the Act does “not permit any person to engage in” and does “not  
27

---

28           <sup>5</sup> See former NRS 453A.200-.210, *inclusive*, and NRS 453.300.

1 prevent the imposition of any civil, criminal, or other penalty” for certain enumerated acts.  
2 Sections 6-8 of the Act (initially codified as NRS 453D.110-.130) delineated the lawful acts  
3 that are exempt from State prosecution.

4 An exemption from State prosecution allows a person to avoid prosecution in State  
5 courts for an act that *otherwise constitutes a criminal offence*. Courts have consistently  
6 recognized this distinction specifically in the context of marijuana legalization legislation.  
7 *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502, 121 S. Ct. 1711,  
8 1724 (2001) (Steven, J., concurring); *Wilson v. Lynch*, 835 F.3d 1083, 1088 (9th Cir. 2016);  
9 *United States v. Pickard*, 100 F.Supp.3d 981, 1010 (E.D. Cal. 2015); *Doe v. State ex rel.*  
10 *Legislature of the 77th Session of Nev.*, 133 Nev. 763, 763-64, 406 P.3d 482, 483 (2017); *City*  
11 *of Missoula v. Shumway*, 434 P.3d 918, 921 (Mont. 2019).

12 Plaintiffs contend that passage of *Nevada Medical Marijuana Initiative* by and of  
13 itself establishes that marijuana has an “accepted medical use” that disqualifies it as a  
14 Schedule I substance under the criteria set forth in NRS 453.166, and argue that this  
15 creates a direct conflict between Nev. Const. art. IV, § 38, and NAC 453.510. Petition at  
16 11:16-22 (¶¶ 38-39). In upholding the Board’s authority to schedule controlled substances,  
17 the Nevada Supreme Court has noted that statutes and regulations “should be construed,  
18 if reasonably possible, so as to be in harmony with the constitution.” *Sheriff, Clark Cty. v.*  
19 *Luqman*, 101 Nev. 149, 154-55, 697 P.2d 107, 111 (1985) (citations omitted). “[A]n act is  
20 presumed to be constitutional and will be upheld unless the violation of constitutional  
21 principles is clearly apparent.” *Id.* Plaintiffs have contrived a conflict where none exists,  
22 since the Board must consider scientific evidence, *not* popular opinion, when evaluating a  
23 substance’s accepted medical use. NRS 453.146(2).<sup>6</sup>

---

24  
25 <sup>6</sup> Certain drugs containing cannabinoids that have been approved by the U.S. Food  
26 and Drug Administration have been descheduled by the Board and are no longer controlled  
27 substances. *See* LCB File No. R090-21, 12-29-2020. Additionally, one form of dronabinol,  
28 a synthetic cannabinoid approved by the U.S. Food and Drug Administration, has been  
listed in Schedule II (*see* LCB File No. R153-99, 3-1-2000), and another form of dronabinol  
listed in Schedule III (*see* LCB File No. R001-19, 10-30-2019).



1 Plaintiffs next conflate precatory language in Section 2 of *Nevada Marijuana*  
2 *Legalization Initiative* stating that “marijuana should be regulated in a manner similar to  
3 alcohol” with the prohibition on scheduling distilled spirits, wine, malt beverages or tobacco  
4 set forth in NRS 453.2186(1) to argue that with the initiative’s passage, descheduling  
5 marijuana was a *fait accompli*. Petition at 12:16-23 (¶¶ 44-45). Such an interpretation  
6 would render Sections 4 and 6-8 of the ballot initiative meaningless and impermissibly  
7 thwart the will of the electorate. *See Torvinen v. Rollins*, 93 Nev. 92, 94, 560 P.2d 915, 917  
8 (1977); *see also City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114,  
9 121, 251 P.3d 718, 722 (2011) (“this court will not read statutory language in a manner that  
10 produces absurd or unreasonable results.”).

11 Plaintiffs also assert that since the *Nevada Marijuana Legalization Initiative* placed  
12 regulatory authority for the Act with the Nevada Department of Taxation (subsequently  
13 transferred to the Cannabis Compliance Board by Assembly Bill No. 533 in the 2019  
14 Legislative Session), this abrogated the Board’s authority to schedule marijuana under  
15 NRS Chapter 453. Petition at 13:1-4 (¶¶46-47). Once again, Plaintiffs make a quantum  
16 leap of logic since the Act makes no reference to NRS Chapter 453 whatsoever. The two  
17 administrative agencies occupy different roles and both exercise a limited, specific level of  
18 regulatory oversight over marijuana in a manner that neither overlaps nor conflicts.

19 NRS Chapter 453 still governs the unlawful possession, trafficking or production of  
20 marijuana, with measured carve-outs for the legitimate activities originally authorized by  
21 the ballot initiatives and now codified in Title 56 and regulated by the Cannabis  
22 Compliance Board. “[W]henever possible, a court will interpret a rule or statute in  
23 harmony with other rules or statutes.” *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989  
24 P.2d 870, 877 (1999) (citations omitted). Nothing in the text of the ballot initiatives can be  
25 reasonably construed to have overridden the scheduling of marijuana in NAC 453.510 or  
26 to have divested the Board of its authority to schedule marijuana in conformance with NRS  
27 Chapter 453.

1                   **2. The Nevada Legislature has not taken any action to deschedule**  
2                   **marijuana.**

3                   The Nevada Legislature could have deleted marijuana as a Schedule I controlled  
4 substance when enacting or amending legislation implementing the ballot initiatives yet  
5 has never done so. Section 35 of Assembly Bill No. 453 in the 2001 Legislative Session  
6 (codified as NRS 453.005) originally stated “The provisions of this chapter do not apply to  
7 the extent that they are inconsistent with the provisions of chapter 453A of NRS.” NRS  
8 453.005 was then amended by Section 214 of Assembly Bill No. 533 in the 2019 Legislative  
9 Session to state: “The provisions of this chapter do not apply to the extent that they are  
10 inconsistent with the provisions of title 56 of NRS.” However, neither bill, nor any of the  
11 other intervening legislation that significantly amended NRS Chapter 453A, addressed the  
12 scheduling of marijuana or repealed the criminal offenses specific to marijuana.<sup>7</sup>

13                   The current scheduling of marijuana in NAC 453.510 also comports with federal law  
14 and the plain language of NRS 453.2182: “If a substance is designated . . . as a controlled  
15 substance pursuant to federal law, the Board shall similarly treat the substance.”  
16 Plaintiffs also disregard the statute’s express mandate that, in the absence of any objection,  
17 the Board shall designate a Schedule I controlled substance consistent with federal law  
18 without making the findings required by NRS 453.166.

19                   It is reasonable to conclude that the continued scheduling of marijuana in NAC  
20 453.510 is consistent with legislative intent. “[A]cquiescence by the legislature . . . may be  
21 inferred from its silence during a period of years.” *Oliver v. Spitz*, 76 Nev. 5, 9, 348 P.2d  
22 158, 160 (1960), cited with approval in *Imperial Palace, Inc. v. State, Dept. of Taxation*, 108  
23 Nev. 1060, 1068, 843 P.2d 813, 818 (1992). Plaintiffs are asking the Court to disrupt the  
24 existing statutory scheme. “Courts should avoid hypertechnical constructions that  
25 frustrate legislative intent.” *Heath v. Kiger*, 176 P.3d 690, 693 (Ariz. 2008) (citations  
26 omitted). Their wish should not be granted.

---

27                   <sup>7</sup> See AB 130 (2003 Session); AB 519 (2005 Session); AB 538 (2009 Session); SB 374  
28 (2013 Session); SB 447 (2015 Session); AB 422 (2017 Session); SB 487 (2017 Session).

1                   **3. Plaintiffs may petition the Board pursuant to NAC 639.140 to**  
2                   **review the scheduling of marijuana.**

3                   Mandamus is not appropriate in insofar as Plaintiffs may petition pursuant to NAC  
4 639.140 to have the current listing of marijuana as a Schedule I controlled substance  
5 reviewed by the Board. *See, e.g., Cty. of Washoe v. Reno*, 77 Nev. 152, 155-56, 360 P.2d 602,  
6 603-04 (1961) (“the fact that mandamus would give an easier or more expeditious remedy  
7 is not the criterion.”). Plaintiffs must pursue this administrative remedy before seeking  
8 judicial relief. “Ordinarily, before availing oneself of district court relief from an agency  
9 decision, one must first exhaust available administrative remedies.” *Malecon Tobacco, Ltd.*  
10 *Liab. Co. v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 839-41, 59 P.3d 474, 475-76 (2002)  
11 (citations omitted); *see also Benson v. State Engineer*, 131 Nev. 772, 779, 358 P.3d 221, 226  
12 (2015) (administrative proceedings are not futile solely because the statute prevents the  
13 petitioner from receiving his or her ideal remedy).

14                   The Board has regularly reviewed and amended the list of Schedule I substances in  
15 NAC 639.510 since passage of the ballot initiatives.<sup>8</sup> Never in that time have Plaintiffs  
16 petitioned the Board.

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

---

26                   <sup>8</sup> *See* LCB File Nos. R001-01, 11-1-2001; R121-04, 8-25-2004; R181-07, 4-17-2008;  
27 R156-10, 5-5-2011; R065-11, 2-15-2012; R023-12, 5-30-2012; R187-12, 2-20-2013; R015-13,  
28 10-23-2013; R015-14, 10-24-2014; R142-14, 12-21-2015; R080-15 & R011-17, 10-31-2017;  
R093-19, 6-8-2020; R090-21, 12-29-2020; R143-20, 4-14-2021; R023-21, 12-22-2021.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Respondent/Defendant’s motion to dismiss should be  
3 granted.

4 Respectfully submitted this 8th day of June, 2022.

5 Pursuant to NRS 239B.030 I affirm that this document does not contain personal  
6 information.

7  
8 By:           /s/ Brett Kandt            
9 Brett Kandt (Bar No. 5384)  
10 General Counsel  
11 Peter K. Keegan (Bar. No. 12237)  
12 Assistant General Counsel  
13 *Attorneys for Respondent/Defendant*  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

