



1 ANSB
2 BRETT KANDT (Bar No. 5384)
3 General Counsel
4 bkandt@pharmacy.nv.gov
5 PETER K. KEEGAN (Bar No. 12237)
6 Assistant General Counsel
7 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*

8 **DISTRICT COURT OF**
9 **CLARK COUNTY, NEVADA**

10 CANNABIS EQUITY AND INCLUSION
11 COMMUNITY (CEIC), a domestic
12 nonprofit corporation; ANTOINE POOLE,
13 an individual,

13 Petitioners/Plaintiffs,

14 vs.

15 STATE OF NEVADA ex rel. BOARD OF
16 PHARMACY, a public entity of the State
17 of Nevada

17 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

18
19 **RESPONDENT/DEFENDANT'S ANSWER TO PETITIONERS/PLAINTIFFS'**
20 **PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY**
21 **AND INJUNCTIVE RELIEF**

21 Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and
22 through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant
23 General Counsel, hereby submits this Answer to Petitioners/Plaintiffs’ Petition for Writ of
24 Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This Answer
25 is based upon the following points and authorities and the papers and pleadings on file
26 herein.

1 passage of Assembly Bill No. 453 in the 2001 Legislative Session, codified as NRS Chapter
2 453A. *The Initiative to Regulate and Tax Marijuana*, enacted in 2016 and codified as NRS
3 Chapter 453D, subsequently authorized the regulation and taxation of marijuana for adult
4 recreational use under limited circumstances and subject to significant restrictions.⁷

5 By passage of Assembly Bill No. 533 in the 2019 Legislative Session, NRS Chapters
6 453A and 453D were repealed and replaced in their entirety by Title 56 of the Nevada
7 Revised Statutes. Certain acts falling within the narrow confines of either NRS Chapter
8 678C (Medical Use of Cannabis) or NRS Chapter 678D (Adult Use of Cannabis) are exempt
9 from State prosecution; otherwise, all other activities involving marijuana remain illegal
10 under Nevada law.

11 **II. LEGAL STANDARD**

12 **A. Writ of Mandamus**

13 Mandamus under NRS Chapter 34 is an extraordinary remedy to compel the
14 performance of an act that the law requires as a duty resulting from an office, trust or
15 station, or to control a manifest abuse or arbitrary or capricious exercise of discretion. *State*
16 *v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). The burden is upon
17 the petitioner to demonstrate that a writ of mandamus is warranted. *American Home*
18 *Assurance Co. v. Dist. Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Mandamus
19 will not lie “when the duty imposed requires deliberation and decision upon facts
20 presented.” *Douglas Cty. Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669,
21 671 (1962).

22 **B. Declaratory Relief**

23 Declaratory relief under NRS Chapter 30 requires a justiciable controversy between
24 persons whose interests are adverse, where the party seeking declaratory relief has a
25 legally protectable interest in the controversy and the issue involved is ripe for judicial
26 determination. *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). An action for
27

28 ⁷ 2016 initiative petition, Ballot Question No. 2.

1 declaratory relief is appropriate when a party merely seeks a ruling on the meaning of a
2 statute, but not to resolve an issue that has been committed for decision to an
3 administrative body. *See Prudential Ins. Co. v. Ins. Comm'r*, 82 Nev. 1, 5, 409 P.2d 248,
4 250 (1966)). Furthermore:

5 [A] judicially-fashioned ‘procedural short-cut,’ combining traditional
6 declaratory judgment and mandamus proceedings, is based squarely on the
7 premise that once the constitutional violation is established (declaratory
8 judgment), the remedy therefor (mandamus) is both self-evident and
9 exclusive.

8 *Tam v. Colton*, 94 Nev. 452, 460, 581 P.2d 447, 452 (1978).

9 C. Injunctive Relief

10 “It is axiomatic that a court cannot provide a remedy unless it has found a
11 wrong. ‘The existence of a right violated is a prerequisite to the granting of an injunction.’”
12 *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993)
13 (citing 43 C.J.S. § 18 *Injunctions* (1978)). Moreover, permanent injunctive relief under
14 NRS 33.010 and NRCP 65 must meet the following criteria:

15 Broadly speaking, an injunction may issue to restrain a wrongful act that
16 gives rise to a cause of action. Permanent injunctive relief may only be
17 granted if there is no adequate remedy at law, a balancing of equities favors
18 the moving party, and success on the merits is demonstrated.

18 *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 824-25, 265 P.3d
19 680, 684 (2011) (citing *State Farm, supra.*).

20 III. ARGUMENT

21 Plaintiffs’ core arguments are that listing marijuana in Schedule I violates Nev.
22 Const. art. 4, § 38 and/or NRS 453.166(2), and that the Board no longer has any authority
23 to schedule marijuana as a controlled substance. Both the premise and the conclusion of
24 these arguments are wrong. Furthermore, the relief Plaintiffs seek will not redress their
25 alleged injuries.

1 **A. Listing marijuana in Schedule I does not conflict with Nev. Const. art.**
2 **4, § 38 or NRS 453.166(2).**

3 **1. Marijuana meets the criteria for Schedule I.**

4 Plaintiffs do not allege that they have been prevented from using marijuana on the
5 advice of a physician in conformance with Nev. Const. art. 4, § 38 and NRS Chapter 678C.
6 Rather, they mistakenly equate the right of a patient to use marijuana “upon the advice of
7 a physician” to marijuana having “accepted medical use in treatment in the United States”
8 in order to fabricate a legal conflict. Petition at 11:16-12:10 (¶¶ 38-41). They do so in a
9 bid to have criminal convictions for unlawful acts falling outside the scope of NRS Chapter
10 678C or 678D overturned.

11 However, the constitutional right to use marijuana “upon the advice of a physician”
12 in Nevada does not establish that marijuana has “accepted medical use in treatment in the
13 United States” thereby precluding its continued designation in Schedule I. Undoubtedly a
14 patient “is fully entitled to rely upon the physician's professional skill and judgment while
15 under his care.” *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Plaintiffs do
16 not allege, and cannot demonstrate, that the current listing of marijuana in Schedule I
17 interferes with the doctor-patient relationship. *See Conant v. Walters*, 309 F.3d 629 (9th
18 Cir. 2002) (distinguishing the ability of doctors in states with medical marijuana laws to
19 “recommend” rather than “prescribe” marijuana in potential violation of the CSA).

20 Nevertheless, marijuana has “no accepted medical use in treatment in the United
21 States” based upon the scientific perspective of marijuana on the national level. All states
22 recognize marijuana’s designation as a Schedule I controlled substance under federal law,
23 even as 37 states and the District of Columbia now permit its medical use.⁸

24
25 ⁸ Alabama Code Chapter 20 Article 2A; Alaska Stat. 17.37.10, et seq.; Arizona Rev.
26 Statutes 36-2801, et seq.; Arkansas Const. of 1874: Amendment 98, § 1, et seq.; California
27 Health and Safety Code: § 11362.5, et seq.; Colorado Const. art. XVIII, § 14; Connecticut
28 Gen. Statutes: Title 21A, § 21a-408, et seq.; Delaware Code: Title 16, § 4901A, et seq.; D.C.
Code Ann. 7-1671.01, et seq.; Florida Statutes: Title XXIX, § 381.986, et seq.; Hawaii Rev.
Statutes: § 329-121, et seq.; Illinois Statutes: Chapter 410, § 130/1, et seq.; Louisiana Rev.
Statutes: Title 40, § 1046, et seq.; Maine Rev. Statutes: Title 22, § 2421, et seq.; Code of

1 Over the years, petitions have been submitted to the U.S. Drug Enforcement
2 Administration (“DEA”) to reschedule marijuana. Most recently, in August 2016, after a
3 five-year medical and scientific evaluation by the U.S. Food and Drug Administration
4 (“FDA”), the DEA rejected two petitions—one submitted by two state governors and the
5 other submitted by a health care provider—to reschedule marijuana under the CSA. See
6 DENIAL OF PETITION TO INITIATE PROCEEDINGS TO RESCHEDULE MARIJUANA, 81 Fed. Reg.
7 53687 (DEA 2016)⁹ and DENIAL OF PETITION TO INITIATE PROCEEDINGS TO RESCHEDULE
8 MARIJUANA, 81 Fed. Reg. 53767 (DEA 2016).¹⁰ Consistent with past practice, the denials
9 were based on the conclusion of the U.S. Department of Health and Human Services that
10 marijuana continues to meet the statutory criteria for inclusion on Schedule I, specifically:

11 (2) *Marijuana has no currently accepted medical use in treatment in the United*
12 *States.* Based on the established five-part test for making such determination,
13 marijuana has no “currently accepted medical use” because: As detailed in the
14 HHS evaluation, the drug's chemistry is not known and reproducible; there
15 are no adequate safety studies; there are no adequate and well-controlled
16 studies proving efficacy; the drug is not accepted by qualified experts; and the
17 scientific evidence is not widely available.

18 The denials included the FDA’s 78-page medical and scientific evaluation entitled “Basis
19 for the Recommendation for Maintaining Marijuana in Schedule I of the Controlled
20 Substances Act.”

21 Maryland Regulations: Chapter 10, § 62.01, et seq.; Code of Massachusetts
22 Regulations: 105 CMR 725.001, et seq.; Michigan Compiled Laws: Chapter 333, § 26421, et
23 seq.; Minnesota Statutes §§152.22-152.37; Mississippi Medical Cannabis Act, SB 2095
24 (2022); Missouri Const. article XIV; Montana Code Annotated: Title 50, § 46-301, et seq.;
25 New Hampshire Rev. Statutes: Title X, Chapter 126-X.; New Jersey Statutes: Title 24, §
26 6I-1, et seq.; New Mexico Statutes: Chapter 26, § 2B-1, et seq.; New York Consolidated
27 Laws: PBH § 3360, et seq.; North Dakota Century Code: Title 19, § 24.1-01, et seq.; Ohio
28 Rev. Code: Title XXXVII, § 3796.01, et seq.; 63 Oklahoma Statutes Supp.2019, §§ 427.1--
427.23; Oregon Rev. Statutes: Section 475B.400.; 35 Pennsylvania Cons. Stat. Chapter 64;
Rhode Island General Laws: Title 21, Chapter 28.6-1, et seq.; South Dakota Codified Laws
Chapter 34-20G; Utah Code 26-61a; Vermont Statutes: Title 18, § 4471, et seq.; Code of
Virginia §§54.1-3442.5-3442.8; Washington Rev. Code: Title 69, Section 51A.005, et seq.;
W.Va. Code Chapter 16A.

⁹ <https://www.govinfo.gov/content/pkg/FR-2016-08-12/pdf/2016-17954.pdf>.

¹⁰ <https://www.govinfo.gov/content/pkg/FR-2016-08-12/pdf/2016-17960.pdf>.

1 The FDA's five-part test for determining whether a drug has "currently accepted
2 medical use in treatment in the United States" has withstood legal challenge. *All. for*
3 *Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994). The DEA's continued
4 designation of marijuana in Schedule I after more than half of the states' enactment of
5 medical marijuana laws has withstood legal challenge. *Ams. for Safe Access v. DEA*, 706
6 F.3d 438, 449-52 (D.C. Cir. 2013). The U.S. Supreme Court has expressly rejected the
7 notion that use of a Schedule I drug can be medically necessary under the CSA,
8 notwithstanding that it has "no currently accepted medical use." *United States v. Oakland*
9 *Cannabis Buyers' Coop.*, 532 U.S. 483, 493 (2001).

10 Marijuana's lack of accepted medical use in treatment on the national level is further
11 demonstrated by a 2017 report from the National Academies of Sciences, Engineering, and
12 Medicine, which concluded in pertinent part:

13 Despite the extensive changes in policy at the state level and the rapid rise in
14 the use of cannabis both for medical purposes and for recreational use,
15 conclusive evidence regarding the short- and long-term health effects (harms
16 and benefits) of cannabis use remains elusive. A lack of scientific research
has resulted in a lack of information on the health implications of cannabis
use, which is a significant public health concern

17 National Academies of Sciences, Engineering, and Medicine, *THE HEALTH EFFECTS OF*
18 *CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS*
19 *FOR RESEARCH*, Washington, DC; National Academies Press, at page 2.¹¹

20 As further evidence of marijuana's lack of accepted medical use in treatment in the
21 United States, the American Medical Association has adopted a policy stating in pertinent
22 part:

23 Our AMA: (1) believes that scientifically valid and well-controlled clinical
24 trials conducted under federal investigational new drug applications are
25 necessary to assess the safety and effectiveness of all new drugs, including
26 potential cannabis products for medical use; (2) believes that cannabis for
medicinal use should not be legalized through the state legislative, ballot
initiative, or referendum process;

27
28 ¹¹ Available at <https://nap.nationalacademies.org/read/24625/chapter/1>.

1 American Medical Association Policy D-95.969, CANNABIS LEGALIZATION FOR MEDICINAL
2 USE (March 1, 2019).¹² Finally, the American Psychiatric Association has adopted a
3 position statement declaring in pertinent part: “[p]olicy and practice surrounding
4 cannabis-derived substances should not be altered until sufficient clinical evidence
5 supports such changes” and further stating “[m]edical treatment should be evidence-based
6 and determined by professional standards of care; it should not be authorized by ballot
7 initiatives.” American Psychiatric Association, POSITION STATEMENT IN OPPOSITION TO
8 CANNABIS AS MEDICINE (July 2019).¹³

9 Plaintiffs’ contention that enactment of the *Nevada Medical Marijuana Initiative* by
10 and of itself establishes that marijuana has an “accepted medical use in treatment in the
11 United States” that disqualifies it as a Schedule I substance is simply wrong. They have
12 contrived a conflict where none exists, since the Board must consider scientific and medical
13 evidence, *not* popular opinion, when evaluating a substance. *See* NRS 453.146(2).¹⁴ The
14 scheduling of marijuana must be viewed *not* from a sociological, ideological or political
15 viewpoint, but from a scientific one.

16 **2. Nothing in the express language of either ballot initiative**
17 **compels the deletion of marijuana from NAC 453.510.**

18 Although the proponents of either ballot initiative could have squarely addressed
19 the deletion of marijuana as a Schedule I controlled substance, both initiatives are silent
20

21 ¹² Available at
22 <https://policysearch.amaassn.org/policyfinder/detail/cannabis?uri=%2FAMADoc%2Fdirectives.xml-D-95.969.xml>.

23 ¹³ Available at <https://www.psychiatry.org/File%20Library/AboutAPA/Organization-Documents-Policies/Policies/Position-Cannabis-as-Medicine.pdf>.

24 ¹⁴ Certain drugs containing cannabinoids that have been approved by the U.S. Food
25 and Drug Administration have been descheduled by the Board and are no longer controlled
26 substances. *See* LCB File No. R090-21, 12-29-2020. Additionally, one form of dronabinol,
27 a synthetic cannabinoid approved by the U.S. Food and Drug Administration, has been
28 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 on the subject. To the contrary, both initiatives are framed to account for and distinguish
2 between the lawful and unlawful use of marijuana.

3 Subsection 2(a) of the *Nevada Medical Marijuana Initiative* states that Section 38
4 does not “[a]uthorize the use or possession of the [cannabis] plant for a purpose other than
5 medical or use for a medical purpose in public.” The implementing legislation subsequently
6 delineated lawful acts that are exempt from State prosecution and other acts that are not
7 exempt.¹⁵ Those provisions together with certain affirmative defenses are now codified at
8 NRS 678C.200, NRS 678C.210, NRS 678C.300 and NRS 678C.310.

9 Section 4 of the *Initiative to Regulate and Tax Marijuana* specified that the Act does
10 “not permit any person to engage in” and does “not prevent the imposition of any civil,
11 criminal, or other penalty” for certain enumerated acts.¹⁶ Sections 6-8 of the Act delineated
12 the lawful acts that are exempt from State prosecution.¹⁷ Those acts that are exempt from
13 State prosecution are now specified in NRS 678D.200, while certain acts that are not
14 exempt from prosecution and other prohibited acts are specified in NRS 678D.300 and
15 678D.310.

16 An exemption from State prosecution allows a person to avoid prosecution in State
17 courts for an act that *otherwise constitutes a criminal offense*. Courts have consistently
18 recognized this distinction specifically in the context of marijuana legislation. *See Oakland*
19 *Cannabis*, 532 U.S. at 502 (2001) (Steven, J., concurring); *Wilson v. Lynch*, 835 F.3d 1083,
20 1088 (9th Cir. 2016); *United States v. Pickard*, 100 F.Supp.3d 981, 1010 (E.D. Cal. 2015);
21 *Doe v. State ex rel. Legislature of the 77th Session of Nev.*, 133 Nev. 763, 763-64, 406 P.3d
22 482, 483 (2017); *City of Missoula v. Shumway*, 434 P.3d 918, 921 (Mont. 2019). The ballot
23 initiatives did not totally legalize or decriminalize marijuana. Any person who engages in
24 marijuana-related activity outside the narrow scope of NRS Chapters 678C or 678D is
25

26 ¹⁵ See former NRS 453A.200, NRS 453.210 and NRS 453.300.

27 ¹⁶ See former NRS 453D.100.

28 ¹⁷ See former NRS 453D.110-.130, *inclusive*.

1 engaging in criminal conduct and subject to potential State prosecution. Plaintiffs’ failure
2 to accept this distinction is fatal to their Petition.

3 **3. The Nevada Legislature has not taken any action to delete**
4 **marijuana from Schedule I.**

5 In the intervening twenty-two years since enactment of Nev. Const. art. 4, § 38, the
6 Legislature has never deemed the deletion of marijuana from the list of Schedule I
7 controlled substances necessary to carrying out the constitutional mandate that marijuana
8 be authorized for a patient’s medical use “upon the advice of a physician.” Section 35 of
9 Assembly Bill No. 453 in the 2001 Legislative Session (codified as NRS 453.005) originally
10 stated “[t]he provisions of this chapter do not apply to the extent that they are inconsistent
11 with the provisions of chapter 453A of NRS.” NRS 453.005 was then amended by Section
12 214 of Assembly Bill No. 533 in the 2019 Legislative Session to state: “[t]he provisions of
13 this chapter do not apply to the extent that they are inconsistent with the provisions of title
14 56 of NRS.” However, neither bill, nor any of the other intervening legislation that
15 significantly amended NRS Chapter 453A, altered the scheduling of marijuana or repealed
16 the criminal offenses specific to marijuana.¹⁸ Nor has any other intervening legislation
17 that amended the criminal penalties related to marijuana.¹⁹

18 It is reasonable to conclude that the continued scheduling of marijuana in NAC
19 453.510 is consistent with legislative intent. “[A]cquiescence by the legislature . . . may be
20 inferred from its silence during a period of years.” *Oliver v. Spitz*, 76 Nev. 5, 9, 348 P.2d
21 158, 160 (1960), cited with approval in *Imperial Palace, Inc. v. State, Dept. of Taxation*, 108
22 Nev. 1060, 1068, 843 P.2d 813, 818 (1992). Plaintiffs are asking the Court to disrupt the
23 existing statutory scheme. “Courts should avoid hypertechnical constructions that

24 ¹⁸ See Assembly Bill No. 130 (2003 Nev. Leg. Session); Assembly Bill No. 519 (2005
25 Nev. Leg. Session); Assembly Bill No. 538 (2009 Nev. Leg. Session); Senate Bill No. 374
26 (2013 Nev. Leg. Session); Senate Bill No. 447 (2015 Nev. Leg. Session); Assembly Bill No.
27 422 (2017 Nev. Leg. Session); Senate Bill No. 487 (2017 Nev. Leg. Session).

28 ¹⁹ See Assembly Bill No. 236 (2019 Nev. Leg. Session); Assembly Bill No. 158 (2021
Nev. Leg. Session); Assembly Bill No. 393 (2021 Nev. Leg. Session); Senate Bill No. 359
(2021 Nev. Leg. Session).

1 frustrate legislative intent.” *Heath v. Kiger*, 176 P.3d 690, 693 (Ariz. 2008) (citations
2 omitted). Their wish should not be granted.

3 **B. The Initiative to Regulate and Tax Marijuana did not divest the**
4 **Board of jurisdiction over the scheduling of marijuana.**

5 Plaintiffs’ ultimate policy-centric goal, to deschedule marijuana entirely, is revealed
6 in their argument that with the subsequent passage of the *Initiative to Regulate and Tax*
7 *Marijuana* the Board was effectively divested of any jurisdiction over marijuana. Petition
8 at 10:11-15 (¶31); 12:13-13:10 (¶¶43-49). Once again, Plaintiffs do not allege that they have
9 been prevented from engaging in recreational use of marijuana in conformance with NRS
10 Chapter 678D. Their endgame is clear: that marijuana no longer be regulated as a
11 controlled substance under Nevada law, even in Schedule II, III, IV or V.²⁰

12 First, Plaintiffs conflate the precatory language in Section 2 of the *Initiative to*
13 *Regulate and Tax Marijuana* stating that “marijuana should be regulated in a manner
14 similar to alcohol” with NRS 453.2186(1)’s prohibition on scheduling distilled spirits, wine,
15 malt beverages or tobacco to argue that with the initiative’s passage, descheduling
16 marijuana was a *fait accompli*. Petition at 12:16-23 (¶¶ 44-45). This construal makes a
17 quantum leap of logic. Such an interpretation would render Sections 4 and 6-8 of the ballot
18 initiative meaningless and impermissibly thwart the will of the electorate. *See Torvinen v.*
19 *Rollins*, 93 Nev. 92, 94, 560 P.2d 915, 917 (1977); *see also City of Reno v. Bldg. & Constr.*
20 *Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011) (“this court will not
21 read statutory language in a manner that produces absurd or unreasonable results.”).
22 Under the current statutory scheme set forth in NRS Chapter 678D, to the extent
23
24

25
26 ²⁰ See NRS 453.176 (Schedule II tests); NRS 453.186 (Schedule III tests); NRS
27 453.196 (Schedule IV tests); NRS 453.206 (Schedule V tests) – a substance with accepted
28 medical use in treatment in the United States is still subject to listing in one of these
schedules based upon the potential for abuse and resulting physical or psychological
dependence.

1 marijuana was authorized for adult recreation use by the *Initiative to Regulate and Tax*
2 *Marijuana*, it is “regulated in a manner similar to alcohol” consistent with Section 2.²¹

3 Plaintiffs next assert that since the *Initiative to Regulate and Tax Marijuana* placed
4 regulatory authority for the Act with the Nevada Department of Taxation (subsequently
5 transferred to the Cannabis Compliance Board by Assembly Bill No. 533 in the 2019
6 Legislative Session), this abrogated the Board’s authority to schedule marijuana under
7 NRS Chapter 453. Petition at 13:1-4 (¶¶46-47). They are essentially arguing that the
8 continued scheduling of marijuana is *ultra vires*. See *Coury v. Robison*, 115 Nev. 84, 88,
9 976 P.2d 518, 520 (1999); *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208,
10 467 P.2d 96, 97 (1970). Plaintiffs vastly oversimplify what is a comprehensive,
11 multilayered statutory scheme in which several governmental entities occupy different
12 roles and exercise their respective levels of regulatory oversight of marijuana in a manner
13 that neither overlaps nor conflicts.

14 The Nevada Division of Public and Behavioral Health, *not* the Cannabis Compliance
15 Board, is responsible for the issuance of registry identification cards and letters of approval
16 authorizing the medical use of marijuana. See NRS 678C.220-.270, *inclusive*. The Nevada
17 Department of Taxation retains authority over the taxation of marijuana. See NRS
18 372A.200-.300, *inclusive*; see also NRS 678B.640 (determination of fair market wholesale
19 value). The Nevada Department of Agriculture retains authority over the use of pesticides
20 in the cultivation of marijuana. See NRS 586.550. Local governments are responsible for
21 adopting and enforcing local cannabis control measures pertaining to zoning and land use
22 for adult-use cannabis establishments. See NRS 678D.510(1)(d). The Board retains
23 jurisdiction over the scheduling of marijuana as a controlled substance, while marijuana-
24 related criminal offenses remain within the purview of law enforcement agencies.

25 In the course of implementing and amending that statutory scheme the Legislature
26

27 ²¹ The tiered licensing and regulatory structure in Title 56 is comparable to the tiered
28 licensing and regulatory structure in NRS Chapter 369 (Intoxicating Liquor; Licenses and
Taxes).

1 has never deemed it necessary to deschedule marijuana or divest the Board of its authority
2 to schedule marijuana. NRS Chapter 453 still governs the unlawful possession, trafficking
3 or production of marijuana, with measured carve-outs for the legitimate activities
4 originally authorized by the ballot initiatives and now codified in Title 56. “[W]hen
5 possible, a court will interpret a rule or statute in harmony with other rules or statutes.”
6 *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (citations omitted).
7 Furthermore, to the extent Plaintiffs believe that the current statutory scheme does not
8 regulate marijuana in a manner sufficiently “similar” to alcohol, their complaint (and any
9 remedy) lies with the Legislature, not with the Board.²²

10 **C. Plaintiffs may petition the Board pursuant to NAC 639.140 to review**
11 **the scheduling of marijuana.**

12 Mandamus is not appropriate insofar as Plaintiffs may petition pursuant to NAC
13 639.140 to have the current listing of marijuana in Schedule I reviewed by the Board. *See,*
14 *e.g., Cty. of Washoe v. Reno*, 77 Nev. 152, 155-56, 360 P.2d 602, 603-04 (1961) (“the fact that
15 mandamus would give an easier or more expeditious remedy is not the criterion.”).
16 Plaintiffs must pursue this administrative remedy before seeking judicial relief.²³
17 “Ordinarily, before availing oneself of district court relief from an agency decision, one must
18 first exhaust available administrative remedies.” *Malecon Tobacco, Ltd. Liab. Co. v. State*
19 *ex rel. Dep’t of Taxation*, 118 Nev. 837, 839-41, 59 P.3d 474, 475-76 (2002) (citations
20 omitted); *see also Benson v. State Engineer*, 131 Nev. 772, 779, 358 P.3d 221, 226 (2015)
21 (administrative proceedings are not futile solely because the statute prevents the petitioner
22 from receiving his or her ideal remedy).

23
24 ²² Plaintiffs mistakenly represent that the unlawful sale of alcohol carries only a
25 \$250 fine under NRS 364.150. (Petition at 8:8-9 (¶22 n.21). Depending on the exact
26 activity, this may constitute a category D felony under NRS 369.495 or a misdemeanor
27 under NRS 369.490 and NRS 369.550.

28 ²³ Plaintiffs’ reliance on *State Bd. of Parole Comm’rs v. Second Judicial Dist. Court*,
451 P.3d 73 (Nev. 2019) is misplaced. (Opp. To Mot. To Dismiss at 18:3-19:5). The review
of scientific and medical evidence pursuant to NRS 453.146 does not require the Board to
answer a legal question.

1 NRS 453.2182 mandates that, in the absence of any objection, the Board *shall*
2 designate a substance consistent with federal law without making the findings required by
3 NRS 453.166. Granted, marijuana was designated in Schedule I by the Legislature prior
4 to the enactment of NRS 453.2182, and the Board may deviate from federal law when
5 scheduling, rescheduling or deleting a controlled substance *if* it makes the determinations
6 required under NRS 453.146. However, it is important to note that NRS 453.146(3)
7 provides that the Board may consider findings of the FDA or the DEA “as prima facie
8 evidence relating to one or more of the determinative factors.” Whether this alone justifies
9 the continued listing of marijuana in Schedule I is a decision left to the Board.

10 In the intervening twenty-two years since the enactment of Nev. Const. art. 4, § 38
11 the Board has regularly reviewed and amended the list of Schedule I substances in NAC
12 453.510 in conformance with NRS 453.211. Never in that time have Plaintiffs – or *any*
13 party – objected to the listing of marijuana in Schedule I or otherwise petitioned the Board
14 pursuant to NAC 639.140 for reconsideration of the scheduling of marijuana in light of the
15 amendment to the Nevada Constitution. This refutes the notion that Plaintiffs have no
16 plain, speedy, and adequate remedy at law and calls into question their inexcusable delay
17 in seeking redress. Plaintiffs now seek to circumvent this statutory administrative
18 rulemaking process altogether and have the Court make scientific determinations that are
19 legislatively delegated to the Board. *See Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-
20 54, 697 P.2d 107, 110 (1985).

21 **D. Granting Plaintiffs their requested relief will not redress their**
22 **alleged injuries.**

23 Plaintiffs request a writ or order directing the Board to remove marijuana from NAC
24 453.510 and divesting the Board of any further authority to schedule marijuana. Petition
25 at 2:1-4; 13:8-10 (¶49); 14:20-21 (¶60); 15:1-10 (¶62); 16-18 (¶¶A and B). In reality,
26 Plaintiffs seek to decriminalize conduct clearly proscribed by the Uniform Controlled
27 Substances Act, a proposition rejected by the Nevada Supreme Court in *Luqman*. 101 Nev.
28 at 157, 697 P.2d at 112-13. Even so, this will not redress their alleged injuries.

1 Plaintiffs allege that “individuals continue to be prosecuted for violating Nevada
2 statutes which rely on the scheduling of marijuana, cannabis and cannabis derivatives as
3 Schedule I substances.” Petition at 14:16-18 (¶59). Aside from Plaintiff Poole, the Petition
4 fails to cite the specific crimes for which these unnamed individuals were convicted.

5 However, most of the relevant criminal offenses expressly reference “marijuana” and
6 do not even rely upon marijuana being scheduled as a controlled substance.²⁴ NRS 453.339
7 prohibits the trafficking of “marijuana” specifically.²⁵ NRS 453.3393 prohibits the unlawful
8 production of “marijuana” specifically.²⁶ NRS 453.336(4) prohibits the unlawful possession
9 of 1 ounce or less of “marijuana” specifically, while subsection (5) prohibits the unlawful
10 possession of more than 1 ounce, but less than 50 pounds, of “marijuana” or more than one-
11 eighth of an ounce, but less than one pound, of “concentrated cannabis.” NRS 453.401(3)
12 imposes a penalty for conspiracy to unlawfully possess more than 1 ounce of “marijuana”
13 specifically. NRS 484C.110(4) prohibits operating a vehicle under the influence of
14 “marijuana” specifically. NRS 212.160(3) prohibits the possession by a State prisoner of “a
15 controlled substance without lawful authorization or marijuana or marijuana
16 paraphernalia, regardless of whether the person holds a valid registry identification
17 card.”²⁷ These criminal offenses will remain on the books and enforceable even if marijuana
18 is no longer scheduled as a controlled substance. Persons previously convicted of these
19

20 ²⁴ Conversely, several of the crimes enumerated in NRS Chapter 453 expressly
21 exclude marijuana. *See* NRS 453.322; NRS 453.3325; NRS 453.3353.

22 ²⁵ NRS 453.339(1) states in pertinent part: “a person who knowingly or intentionally
23 sells, manufactures, delivers or brings into this State or who is knowingly or intentionally
24 in actual or constructive possession of *marijuana or concentrated cannabis* shall be
25 punished” (Emphasis added).

26 ²⁶ NRS 453.3393(1) states in pertinent part: “A person shall not knowingly or
27 intentionally manufacture, grow, plant, cultivate, harvest, dry, propagate or process
28 *marijuana*, except as specifically authorized by the provisions of this chapter or chapter
453A of NRS.” (Emphasis added).

²⁷ Note that the statute distinguishes between an inmate’s possession of a controlled
substance pursuant to a valid prescription (lawful), and possession of marijuana with a
valid registry identification card (unlawful).

1 offenses will gain no benefit from the relief requested.

2 The Petition conveniently omits any reference to these criminal offenses, only citing
3 to NRS 453.336(1), NRS 453.337 and NRS 202.360. (Petition at 8:8-9 (¶22 n.21)). NRS
4 453.336(1) and (2) prohibit the unlawful possession of any controlled substance, but these
5 subsections have largely been supplanted by subsections (4) and (5) for possession of
6 marijuana. NRS 202.360 prohibits the possession of a firearm by a person who “unlawfully”
7 uses any controlled substance, but the prohibition does not apply to a person “lawfully”
8 using marijuana in conformance with NRS Chapters 678C or 678D. NRS 453.337 prohibits
9 the unlawful possession for the purpose of sale of any controlled substance classified in
10 Schedule I or II, but the unlawful possession of marijuana for the purpose of sale was
11 clearly proscribed under both ballot initiatives and reflected in all subsequent legislation.²⁸

12 Plaintiff Poole’s alleged injury, that he was convicted of marijuana possession in
13 violation of NRS 453.336(1) and (2) after the enactment of Nev. Const. art. 4, § 38 (Petition
14 at 4:1-6 (¶1); 6:1-4 (¶10), can only be redressed by a judicial ruling that enactment of the
15 *Nevada Medical Marijuana Initiative* actually descheduled marijuana as a controlled
16 substance altogether.²⁹ A ruling to this effect will not even fully redress the alleged injuries
17 of the unidentified CEIC members with convictions for offenses specific to marijuana.
18 Moreover, the alleged injuries to CEIC’s members are impermissibly generalized and any
19 redressability to CEIC or its members by way of its requested relief remains speculative.
20 *See, e.g., Laborers' Int'l Union of N. Am., Local 169 v. Douglas Cty.*, 454 P.3d 1259, 2019
21 Nev. Unpub. LEXIS 1374 at *2 (Nev. Dec. 19, 2016) (“speculative interests are not legally
22

23 ²⁸ Subsection 1(e) of the *Nevada Medical Marijuana Initiative* states: “The
24 legislature shall provide by law for . . . [a]uthorization of appropriate methods for supply
25 of the plant to patients authorized to use it. Section 2 of the *Initiative to Regulate and Tax
26 Marijuana* states: “Marijuana may only be purchased from a business that is licensed by
27 the State of Nevada.”

28 ²⁹ Poole was arrested for possession of a controlled substance in violation of NRS
453.336 on May 20, 2016 (*see* criminal information filed in case no. C-16-319916-1), *prior*
to enactment of the *Initiative to Regulate and Tax Marijuana*; his subsequent conviction
after enactment of that ballot initiative is moot.

