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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

Case No.: A-22-851232-W

Department: 15

**PETITIONERS'/PLAINTIFFS' REPLY TO RESPONDENT'S/DEFENDANT'S
ANSWER TO PETITIONERS'/PLAINTIFFS' PETITION FOR WRIT OF MANDAMUS
AND COMPLAINT FOR DECLARATORY RELIEF**

The Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community ("CEIC") and Antoine Poole, by and through counsel, Christopher M. Peterson, Esq., Sadmira Ramic, Esq., and Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, hereby submit this reply to the Respondent/Defendant's Answer to Petitioners'/Plaintiffs' Petition for Writ of Mandamus pursuant to NRS 34.260.

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MEMORANDUM OF POINTS AND AUTHORITIES

This matter raises two legal issues: (1) whether the Nevada State Board of Pharmacy’s (hereafter referred to as “Board”) designation of cannabis as a Schedule I substance, which requires the Board to find that that cannabis has “no accepted medical value in the United States” violates the Nevada Constitution in that Article 4, Section 38 explicitly guarantees that patients with certain enumerated medical diagnoses will have access to cannabis for medical treatment, and (2) whether the Board of Pharmacy is excluded from the current comprehensive regulatory regime where state agencies other than the Board oversee the cultivation, transportation, storage, dispensation, and use of cannabis in Nevada without Board involvement. Both issues are fundamentally about overreach by a state agency of the Executive branch.

The scope of a Nevadan administrative agency’s authority is limited to the matters that the Nevada State Legislature has expressly or implicitly delegated to the agency, and “an administrative agency cannot enlarge its own jurisdiction.” *City of Reno v. Civil Serv. Comm’n of Reno*, 117 Nev. 855, 858 (2001). While an administrative body may make rules and regulations calculated to carry into effect the expressed legislative intention, it may only do so within “prescribed limits and when authorized by the law-making power.” *Cashman Photo Concessions & Labs v. Nev. Gaming Comm’n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975). However, regulations that are unauthorized by the law-making power or go beyond the limits prescribed by the Legislature are invalid. *See Id.* If authority to regulate on a particular matter is not explicitly delegated to an agency, the agency must have implicit authority for the action, but “[f]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty.” *Stockmeier v. State*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011).

The Board claims that Article 4, Section 38 of the Nevada Constitution does not restrict its authority to designate cannabis a Schedule I substance, and it retained the authority to regulate cannabis despite seismic changes in cannabis’s regulatory regime with the Legislature’s passage of Nevada Revised Statute “Title 56 – Regulation of Cannabis”. These claims are inaccurate.

1 In arguing that it may designate cannabis a Schedule I substance, the Board relies solely
2 on references to federal agencies and “national” organizations. In doing so, it misinterprets the
3 term “in the United States” as used in NRS 453.166’s definition of Schedule I by suggesting that
4 the term is synonymous with the federal government rather than denoting a geographical boundary.
5 Nevada is “in the United States” and, along with the majority of other states, has accepted that
6 cannabis has medical value. Furthermore, this acceptance is enshrined in Nevada’s Constitution,
7 which is binding on state agencies such as the Board of Pharmacy.

8 As to whether the Board is authorized to regulate cannabis under the current regulatory
9 regime described in NRS Title 56, the Board offers no legal authority comparable to that granted
10 to the other state agencies involved in regulating cannabis. Furthermore, the Board errs in
11 suggesting that its participation is necessary for the regime to function as intended, as seen in the
12 very sections of the *Initiative* cited by the Board in its Answer.

13 **I. The Board errs when it claims cannabis satisfies NRS 453.166’s definition of a**
14 **“Schedule I” substance in spite of Article 4 § 38 of the Nevada Constitution due to the**
15 **Board misinterpreting the term “in the United States”.**

16 As discussed in the Petition, the Board may only designate substances as “Schedule I” if
17 the substance satisfies the definition provided in NRS 453.166. *See Miller v. Jacobson*, 104 Nev.
18 600 (1988) (finding that the Board of Pharmacy unlawfully scheduled a substance that did not
19 meet the definition of controlled substance under NRS Chapter 453). Pursuant to NRS 453.166,
20 such a substance must have:

- 21 (1) A high potential for abuse, and
- 22 (2) “[N]o accepted medical use in treatment in the United States” or lack
23 accepted safety for use in treatment under medical supervision.

24 The Board claims that it has the authority to designate cannabis a Schedule I substance in spite of
25 Article 4 § 38 of the Nevada Constitution because the Board has the authority to find that cannabis
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1 has no accepted medical value “in the United States”.¹ To support this position, the Board does
2 not cite Nevada law but rather emphasizes the importance of “national” agencies and organizations
3 in making that determination, relying on reports published by the federal government’s Drug
4 Enforcement Agency and two other “national” entities as well as the current regulations
5 promulgated by federal agencies.² However, the Board’s position fails to appreciate that the term
6 “in the United States” as used in NRS 453.166 refers to the geographical boundaries of the United
7 States, not the federal government or “national” organizations.

8 Courts interpreting the term “in the United States” have consistently recognized that the
9 term refers to presence inside geographic boundaries of the United States, not the United States
10 government or “national” organizations. *See Fitisemanu v. United States*, 1 F.4th 862, 875 (10th
11 Cir. 2021) (“The Citizenship Clause's applicability hinges *on a geographic scope clause*—‘in the
12 United States’”) (emphasis added); *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1304 (11th Cir.
13 2012) (describing “in the United States” as a “strict temporal and geographic requirement”);
14 *United States v. Balde*, 943 F.3d 73, 81 (2d Cir. 2019) (“The plain meaning of the statute reflects
15 that ordinary meaning: a person, citizen or noncitizen, is ‘in’ the United States when he or she is
16 present within its geographic borders.”). This interpretation is also consistent with how the term
17 “in the United States” is used throughout the Nevada Revised Statutes. *See, e.g.* NRS 2.460
18 (referring to the physical location of libraries “in the United States”); NRS 179A.160 (referring to
19 “any jurisdiction in the United States”); NRS 200.467 (referring to the “legal right to enter or
20 remain in the United States”). By comparison, the Nevada Revised Statutes, including NRS
21 Chapter 453, refers explicitly to the “Federal Government” when referring to that entity or its
22 agencies, and to the “laws of the United States” when discussing federal law rather than the United
23

24 ¹ Respondent/Defendant’s Answer to Petitioners/Plaintiffs’ Petition for Writ of Mandamus and
25 Complaint for Declaratory and Injunctive Relief (hereafter “Answer”) at 5. The Board does not
26 claim that cannabis “lacks accepted safety for use in treatment under medical supervision” in its
27 Answer.

² Answer at 5–8.

1 States as a physical location. *See* NRS 453.154 (specifically referencing “agencies” and “the
2 Federal Government”); NRS 453.316 (referring “the laws of the United States”).

3 Due to this error in interpretation, the Board errs in focusing solely on “national”
4 organizations and federal agencies, referring to “the scientific perspective on the national level”
5 without explaining where it drew that standard or why that would be controlling over other findings
6 “in the United States”.³ As the Board notes in its Answer, 37 states *in the United States* have
7 legalized cannabis for medical use, effectively accepting its medical value.⁴ Many of these states
8 mandate that their agency equivalent of the Nevada Board of Pharmacy designate substances that
9 have a high potential for abuse and “no accepted medical value in the United States” as Schedule
10 I substances but have determined that cannabis does not meet this definition, by either not
11 designating cannabis a controlled substance or by including it on a schedule other than Schedule
12 I.⁵ Specifically states such as Arkansas, North Carolina, and Tennessee have scheduled cannabis
13 as a Schedule VI substance while Colorado and Illinois have completely removed it from their
14 controlled substance schedules.⁶ Of course, Nevada is also a state *in the United States* and has

15 ³ Answer, 5:20–21. It is also worth noting that the reports referenced by the Board do not
16 conclusively say that cannabis does not have medical value but rather that more studies need to be
17 performed before a conclusion can be drawn. National Academies of Sciences, Engineering, and
18 Medicine, *The Health Effects of Cannabis and Cannabinoids: the Current State of Evidence and*
19 *Recommendations for Research*, Washington, DC; National Academies Press, at page 1
20 (“conclusive evidence regarding the short- and long-term health effects [*harms and benefits*] of
21 cannabis use remains elusive. A lack of scientific research has resulted in a lack of information on
the health implications of cannabis use”), p. 382 (“there are specific regulatory barriers, including
the classification of cannabis as a Schedule I substance, that impede the advancement of cannabis
and cannabinoid research”), and p. 384 (“it is often difficult for researchers to gain access to the
quantity, quality, and type of cannabis product necessary to address specific research questions on
the health effects of cannabis use”).

22 ⁴ Answer, 5:22–23.

23 ⁵ *See, e.g.* Ark. Code Ann. § 5-64-203 (Arkansas); N.C. Gen. Stat. § 90-89 (North Carolina);
24 Tenn. Code Ann. § 39-17-405 (Tennessee); Colo. Rev. Stat. § 18-18-203 (Colorado); 720 Ill.
25 Comp. Stat. Ann. 570/203 (Illinois).

26 ⁶ Multiple states have re-designated cannabis to a lower schedule from Schedule I. *See* 007-07
27 Ark. Code R. § 002 (designating cannabis as a Schedule VI substance); 10A N.C. Admin. Code
26F.0107 (designating cannabis as a Schedule VI substance); Tenn. Comp. R. & Regs. 0940-06-

1 accepted that cannabis has medical value and enshrined this belief in the State constitution. Nev.
2 Const. Art. 4 § 38.

3 Finally, the Board again states that it “must consider scientific and medical evidence, not
4 popular opinion, when evaluating a substance.”⁷ This attitude, referring to two ballot initiatives
5 passed through legal referendum, provisions of the Nevada Constitution, and an entire chapter of
6 the Nevada Revised Statutes⁸ as mere “popular opinion”, is precisely why this matter is before this
7 Court. The Board may have discretion when acting within the boundaries of its authority, but it
8 has no discretion as to whether it must follow this state’s statutes and Constitution.

9 **II. The Board errs when it claims that it has retained the authority to regulate cannabis**
10 **under the current cannabis regulatory regime without an express grant of authority**
11 **similar to those offered by the Legislature to other Nevada state agencies.**

12 In its Answer, the Board observes that the regulation of cannabis in Nevada is handled by
13 multiple Nevada state agencies.⁹ The current “comprehensive, multilayered statutory scheme” to
14 regulate cannabis, as the Board describes it, is laid out in Title 56, and the Board is correct in that
15 the Legislature *explicitly* authorizes a variety of state agencies to regulate different aspects of the
16 cannabis industry, including:

- 17 • The Cannabis Compliance Board is *explicitly* authorized to “adopt regulations necessary
18 or convenient to carry out the provisions of [Title 56].”¹⁰ NRS 678A.450(1). This authority
19 includes the regulation of “medical cannabis dispensaries” as defined by NRS 678A.175
20 and the “medical use of cannabis” as defined by NRS 678A.215.
- 21 • The Cannabis Advisory Commission is *explicitly* authorized to make “recommendations
22 to the Cannabis Compliance Board regarding the regulation of, cannabis and any activity

23 _____
24 01-.06 (designating cannabis as a Schedule VI substance). Others with similar definitions of
25 Schedule I substances, including Colorado and Illinois, have not designated cannabis as a
26 controlled substance at all, regulating it directly through statute.

27 ⁷ Answer, 8:11–13.

⁸ NRS Chapter 453B, now NRS Chapter 678B.

⁹ Answer, 12:14–22.

¹⁰The breadth and scope of the NRS Title 56 is in its title: “Regulation of Cannabis”.

1 related to the cannabis” and *explicitly* placing the Directors of the Departments of Public
2 Safety and Taxation on the Commission. NRS 678A.300(1).

- 3 • The Nevada Division of Public and Behavioral Health is *explicitly* authorized to
4 promulgate regulations related to “the issuance of registry identification cards and letters
5 of approval to persons” eligible for medical cannabis under Nevada law. NRS 678B.640.
- 6 • The Nevada Department of Agriculture is *explicitly* authorized to promulgate regulations
7 regarding what pesticides may be used on cannabis or cannabis products. NRS 586.550(2);
8 *see also* NRS 678A.400 (authorizing the Cannabis Compliance Board to consult with the
9 Department of Agriculture on matters related to hemp); NRS 678B.600 (exempting
10 Department of Agriculture employees from cannabis related criminal offenses).
- 11 • The Nevada Department of Taxation is *explicitly* authorized to conduct tax audits on
12 licensees under Title 56 and to determine the fair market value of wholesale cannabis. NRS
13 678A.480; NRS 678B.640.
- 14 • Local governments are *explicitly* authorized to adopt and enforce local cannabis control
15 measures pertaining to zoning and land use for adult-use cannabis establishments. NRS
16 678D.510(1)(d).

17 Yet no similar statute authorizes the Board of Pharmacy to regulate any aspect of the cannabis
18 industry, let alone trigger a slew of criminal provisions by unilaterally keeping cannabis on its list
19 of Schedule I substances. The Board claims it “retains jurisdiction over the scheduling of cannabis
20 as a controlled substance” yet offers no citation to authorization from the Legislature to do so.¹¹
21 In fact, there is no reference to the Board of Pharmacy in all of Title 56. The Board suggests that
22 it is the Legislature’s burden to specifically deny the Board the authority to regulate cannabis,¹²
23 but this misplaces the obligation; it is on the Board to establish that the agency has authority from
24 the Legislature to regulate, not on the Legislature to deny that authority.

25 The Board’s absence from Title 56 makes sense considering that the Board of Pharmacy’s
26 primary purpose is the regulation of pharmacies and the substances that pharmacies dispense, as
27 the agency’s name denotes. The Board’s general powers are not even described in NRS Chapter
453 but rather in NRS Chapter 639, which is titled “Pharmacists and Pharmacies”. *See* NRS

¹¹ Answer, 12:22–24 (offering no legal citation in support of claim).

¹² Answer, 13:7–9.

1 639.070.¹³ Cannabis, both medical and recreational, has nothing to do with pharmacies since,
2 under the current regulatory regime, both types of cannabis are dispensed under Nevada law by
3 dispensaries, not pharmacies. NRS 678A.450(1) (authorizing the Cannabis Compliance Board to
4 regulate the dispensation of both medical and recreational cannabis). Under the statutory scheme,
5 the Board could not authorize a pharmacy to distribute cannabis as any distributor of cannabis
6 must be licensed by the Cannabis Control Board. *Id.*; *see also* Cannabis Compliance Board,
7 *Medical Cannabis*, <https://ccb.nv.gov/nevada-cannabis-program/#item-0> (August 17, 2022) (“As
8 of July 1, 2020, the medical cannabis program is administered by the Cannabis Compliance
9 Board”). Considering that every aspect of the cannabis industry, including dispensation, is
10 regulated by state agencies whose roles are explicitly described by statute, the Board of Pharmacy
11 is not included in cannabis’s regulatory regime because the Board is not necessary. Moreover, the
12 Board has specifically and explicitly advised the public that it “has no jurisdiction over the medical
13 use of marijuana.”¹⁴

14 Recycling an argument from its Motion to Dismiss,¹⁵ the Board further claims that
15 excluding the Board from cannabis’s regulatory regime would “render Sections 4 and 6-8 of the
16 [*Initiative to Regulate and Tax Marijuana*] meaningless and impermissibly thwart the will of the
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19 ¹³ Interestingly, the only reference to cannabis in the entirety of NRS Chapter 639 suggests that
20 cannabis, like alcohol, is *not* a controlled substance. In a provision discussing what must be in a
21 prescription medication agreement, the agreement must include “a requirement that the patient
22 inform the practitioner: (1) [o]f any other controlled substances prescribed to or taken by the
23 patient; (2) [w]hether the patient drinks alcohol or uses cannabis or any other cannabinoid
24 compound while using the controlled substance.” NRS 639.23914(2)(e)(1–2). The inclusion of
25 cannabis under the second subsection would be redundant if it is a controlled substance under the
26 first subsection.

27 ¹⁴ Nevada State Board of Pharmacy, *Practice Frequently Asked Questions*,
https://bop.nv.gov/resources/FAQ/Practice_FAQ/ (August 17, 2022).

¹⁵ Respondent/Defendant’s Motion to Dismiss for Lack of Jurisdiction and Failure to State a
Claim (hereafter “Motion”) at 7:20–7:23.

1 electorate.”¹⁶ As Petitioners observed in their Opposition to the Motion to Dismiss,¹⁷ these sections
2 actually favor a finding that the Board is no longer part of that regime. For example, while Section
3 4 “does not prevent the imposition of any civil, criminal, or other penalty for” certain enumerated
4 acts (e.g. driving under the influence of cannabis, possessing cannabis in prisons, etc.), the
5 *Initiative* does not require cannabis to be a “controlled substance” by the Board for the Legislature
6 to make those enumerated actions illegal.¹⁸

7 At its core, the Board’s logic is that since some acts involving cannabis are still illegal, the
8 Board has retained the right to regulate cannabis.¹⁹ Provisions such as NRS 212.160, and others
9 cited by the Board in its own Answer,²⁰ expose that fallacy: the State Legislature is perfectly
10 capable of determining what acts involving cannabis are criminal without the Board’s
11 involvement, just as it does with alcohol.

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14 ¹⁶ Answer at 11:17–18.

15 ¹⁷ Petitioners’/Plaintiffs’ Opposition to Respondent’s/Defendant’s Motion to Dismiss for Lack of
16 Jurisdiction and Failure to State a Claim (hereafter “Opposition”) at 23–24.

17 ¹⁸ To provide a more specific example, the act described in Section 4, Subsection 1(c) is illegal
18 under NRS 212.160, which states:

19 A prisoner confined in an institution of the Department of Corrections, or any other
20 place where prisoners are authorized to be or are assigned by the Director of the
21 Department, who possesses a *controlled substance without lawful authorization or
22 marijuana or marijuana paraphernalia*, regardless of whether the person holds a
valid registry identification card to engage in the medical use of cannabis pursuant
to chapter 678C of NRS, is guilty of a category D felony and shall be punished as
provided in NRS 193.130.

23 NRS 212.160(3) (emphasis added). Relying on the same canon of statutory interpretation as the
24 Respondent used in its Motion to Dismiss, plain language of NRS 212.160 indicates that the
25 Legislature does not intend for cannabis to be a “controlled substance” under the Board’s control,
otherwise the language “or marijuana or marijuana paraphernalia” would be superfluous.

26 ¹⁹ Answer at 9:24, 10:1–2.

27 ²⁰ Answer at 16:5–18.

1 **III. To the extent that Board seeks to re-litigate issues it raised in its Motion to Dismiss**
2 **related to standing and exhaustion, Petitioner incorporates points and authorities**
3 **raised in their Opposition to the Motion to Dismiss.**

4 The Board seeks to re-litigate issues raised in its Motion to Dismiss, which are addressed
5 in Petitioners' Opposition, specifically that (1) Petitioners lack standing to bring a petition for writ
6 of mandamus, (2) the Nevada Legislature has not explicitly removed cannabis from the list of
7 Schedule I controlled substance, and (3) Petitioners are barred from petitioning for a writ of
8 mandamus as they have an adequate and speedy remedy at law, specifically that the Petitioners
9 were required to petition the Board prior to petitioning for writ of mandamus. Though the Court
10 has already ruled on the Board's Motion to Dismiss, to the extent necessary, Petitioners incorporate
11 the relevant responses from their Opposition into this reply.²¹

12 DATED this 17th day of August 2022.

13 Pursuant to NRS 53.045, I declare under
14 penalty of perjury that the foregoing is
15 true and correct.

16 **AMERICAN CIVIL LIBERTIES**
17 **UNION OF NEVADA**

18 /s/ Christopher Peterson
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25 ²¹ Opposition at 9–17(response to arguments related to standing), 17–19 (response to arguments
26 that Petitioners have an adequate and speedy remedy such as petitioning the Board), 25 (response
27 to arguments that the Legislature has not explicitly removed cannabis from the list of Schedule I
controlled substances).

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August 2022, I caused a true and correct copy of the foregoing **PETITIONERS’/PLAINTIFFS’ REPLY TO RESPONDENT’S/DEFENDANT’S ANSWER TO PETITIONERS’/PLAINTIFFS’ PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY RELIEF** to be electronically filed and served to all parties of record via the Court’s electronic filing system to all parties listed on the e-service master list.

/s/Courtney Jones
An employee of ACLU of Nevada