

1 **NOAS**
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 State of Nevada, Board of Pharmacy
9 985 Damonte Ranch Parkway – Suite 206
10 Reno, NV 89521
11 TEL: (775) 850-1440
12 *Attorneys for Respondent/Defendant*

9 **EIGHTH JUDICIAL DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

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

14 Petitioners/Plaintiffs,

15 vs.

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

18 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

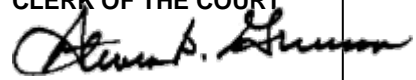
19 **NOTICE OF APPEAL**

20 NOTICE IS HEREBY GIVEN that THE STATE OF NEVADA ex rel. its BOARD
21 OF PHARMACY, hereby appeals pursuant to NRAP 3 to the Nevada Supreme Court from
22 the Judgment and Order Granting Petition for Writ of Mandamus and Request for
23 Declaratory Relief entered on October 26, 2022. The Notice of Entry of Order in this
24 matter was filed on October 26, 2022.

1 Respectfully submitted this 23rd day of November 2022.

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

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 **ASTA**
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 State of Nevada, Board of Pharmacy
9 985 Damonte Ranch Parkway – Suite 206
10 Reno, NV 89521
11 TEL: (775) 850-1440
12 *Attorneys for Respondent/Defendant*

9 **EIGHTH JUDICIAL DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

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

Case No. A-22-851232-W

Dept. No. 15

14 Petitioners/Plaintiffs,

15 vs.

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

Respondent/Defendant.

19 **CASE APPEAL STATEMENT**

20 Pursuant to NRAP 3(f), the State of Nevada ex rel. Board of Pharmacy (“Board”), hereby
21 submits the following case appeal statement:

22 A. District court case number and caption, showing names of all parties to the
23 proceedings (without using *et al.*): The full case numbers and captions, showing names of
24 all parties, are as follows: Case Number A-22-851232-W; Cannabis Equity and Inclusion
25 Community (CEIC); a domestic nonprofit corporation; Antoine Poole, an individual v. State
26 of Nevada ex rel. Board of Pharmacy, a public entity of the State of Nevada.

27 B. Name of judge who entered the order or judgment being appealed:
28 The Honorable Joe Hardy, District Court Judge, Eighth Judicial District Court.

1 C. Name of each appellant, and name and address of counsel for each appellant:

2 State of Nevada ex rel. Board of Pharmacy through its counsel:

3 Brett Kandt
4 General Counsel
5 Peter Keegan
6 Assistant General Counsel
7 985 Damonte Ranch Pkwy #206
8 Reno, NV 89521

9 D. Name of each respondent, and name and address of each respondent's
10 appellate counsel, if known: Cannabis Equity and Inclusion Community (CEIC); Antoine
11 Poole, through their counsel:

12 Sadmira Ramic, Esq.
13 Christopher M. Peterson, Esq.
14 Sophia Romero, Esq.
15 American Civil Liberties Union of Nevada
16 601 South Rancho Drive, Suite B-11
17 Las Vegas, NV 89106

18 E. Whether attorneys identified in subparagraph D are not licensed to practice
19 law in Nevada; and, if so, whether the district court granted permission to appear under
20 SCR 42 (include copy of district court order granting permission): The attorneys in
21 subparagraph D are licensed in Nevada.

22 F. Whether appellant was represented by appointed counsel in the district court
23 or on appeal: Appellant was represented by retained counsel in the district court and will
24 be represented by retained counsel on appeal.

25 G. Whether any appellant was granted leave to proceed *in forma pauperis*: No.

26 H. Date proceedings were commenced in district court: April 15, 2022.

27 I. Brief description of nature of the action and result in district court, including
28 type of judgment or order being appealed and relief granted by district court: Petition for
Writ of Mandamus and Complaint for Declaratory and Injunctive Relief. The Court
granted declaratory and writ relief, ruling that the listing of marijuana, cannabis, and
cannabis derivatives as Schedule I controlled substances in NAC 453.510 (4), (9) and (10)
is in direct conflict with Nev. Const. art. 4, § 38 and violates NRS 453.166, and ordering

1 that marijuana be removed from NAC 453.510 and that the Board cease the regulation of
2 substances subject to regulation pursuant to Title 56 of NRS.

3 J. Whether the case was previously the subject of appeal or writ proceeding in
4 Nevada Supreme Court and, if so, caption and docket number of prior proceeding: No.

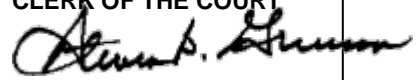
5 K. Whether the appeal involves child custody or visitation: No.

6 L. Whether the appeal involves the possibility of settlement: Settlement may be
7 possible.

8 Respectfully submitted this 23rd day of November 2022.

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

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



1 **MSTY**

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 State of Nevada, Board of Pharmacy

9 985 Damonte Ranch Parkway – Suite 206

10 Reno, NV 89521

11 TEL: (775) 850-1440

12 *Attorneys for Respondent/Defendant*

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

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

19 Petitioners/Plaintiffs,

20 vs.

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

24 Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

HEARING REQUESTED

25 **RESPONDENT/DEFENDANT’S MOTION TO STAY JUDGMENT AND ORDER**
26 **PENDING APPEAL**

27 Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and
28 through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant
General Counsel, hereby submits this motion to stay the Judgment and Order Granting
Petition for Writ of Mandamus and Request for Declaratory Relief (“Judgment and Order”)
entered by the Court on October 26, 2022. This motion is made pursuant to NRAP 8 and
NRCF 62 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 **I. PROCEDURAL HISTORY**

3 On October 26, 2022, the Court entered the Judgment and Order granting
4 Petitioners declaratory and writ relief, ruling in pertinent part that the listing of
5 marijuana, cannabis, and cannabis derivatives (hereinafter “marijuana”) as Schedule I
6 controlled substances in NAC 453.510 (4), (9) and (10) is in direct conflict with Nev. Const.
7 art. 4, § 38 and violates NRS 453.166, and ordering that marijuana be removed from NAC
8 453.510 and that the Board “cease the regulation of substances subject to regulation
9 pursuant to Title 56” of NRS. The Board has filed a Notice of Appeal from the Judgment
10 and Order concurrently with this motion.

11 **II. LEGAL STANDARD**

12 “In the ordinary course of civil appeals, an appellant must comply with NRCP
13 8(a) which provides that an application for stay of a judgment or order must typically be
14 made to the district court.” *State ex rel. Pub. Serv. Comm'n v. First Judicial Dist. Court*,
15 94 Nev. 42, 44, 574 P.2d 272, 273-74 (1978) cited in *Clark Cty. Office of the Coroner/Medical*
16 *Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018). “When an
17 appeal is taken by the State . . . and the operation or enforcement of the judgment is stayed,
18 no bond, obligation, or other security shall be required from the appellant.” *Id.*

19 When considering a stay, courts weigh a number of factors: (1) whether the object
20 of the appeal will be defeated if the stay is denied; (2) whether petitioner will suffer
21 irreparable injury if the stay is denied; (3) whether the real party in interest will suffer
22 irreparable injury if the stay is granted; and (4) whether petitioner is likely to prevail on
23 the merits of the appeal. NRAP 8(c). No single factor is dispositive and, “if one or two
24 factors are especially strong, they may counterbalance other weak factors.” *Mikohn*
25 *Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

1 **III. ARGUMENT**

2 The Judgment and Order represents a tectonic shift in State law with repercussions
3 far beyond the scope of the Board’s jurisdiction: it impacts State regulation of marijuana
4 altogether, the delineation of what may or may not constitute criminal conduct and,
5 ultimately, public safety. Questions of whether an irreconcilable conflict exists between
6 Nev. Const. art. 4, § 38, NRS 453.166, and NAC 453.510, and of whether the Board has any
7 authority to schedule marijuana as a controlled substance, are issues of first impression,
8 implicating the separation of powers, involving constitutional and statutory interpretation,
9 with far-reaching ramifications. A stay is in the best interests of the State pending
10 resolution of the Board’s appeal.

11 **A. Denying the stay will defeat the object of the appeal and result in**
12 **irreparable injury to the public caused by legal ambiguity over the**
13 **status of marijuana under State law.**

14 Rendering portions of NAC 453.510 unenforceable and requiring the Board to
15 commence the administrative rulemaking process to remove marijuana from Schedule I
16 even as the Board seeks appellate review of the Judgment and Order will create a layer of
17 legal uncertainty where none existed before, thrusting Nevada into a legal “no man's land”
18 as to the status of marijuana outside of NRS Title 56. This results in part from the
19 language and scope of NRS Chapter 453, and in part from the requirements of the
20 Administrative Procedure Act, NRS Chapter 233B.

21 Due to the timing of the Judgment and Order, the Board must first adopt a
22 temporary regulation suspending the listing of marijuana in Schedule I. NRS 233B.063(3).
23 Such a temporary regulation would expire by limitation on November 1, 2023. *Id.*; *see also*
24 *Progressive Leadership All. of Nev. v. Cegavske*, No. 85434, 2022 Nev. Unpub. LEXIS 780
25 *2 (Oct. 25, 2022). Thereafter, a permanent regulation removing marijuana from NAC
26 453.510 (4), (9) and (10) must be adopted after July 1, 2023, following all the procedural
27 formalities required by NRS Chapter 233B. Should the Board ultimately prevail on appeal,
28 this would then necessitate amending NAC 453.510 to place marijuana *back* into Schedule
I, a task comparable to putting toothpaste back in the tube or unscrambling an egg.

1 The peril of requiring the Board to amend NAC 453.510 at this juncture is further
2 evidenced in that the Court has also ruled that “the Board no longer has the authority to
3 regulate [marijuana, cannabis, and cannabis derivatives] because they are now regulated
4 pursuant to NRS Title 56.” Judgment and Order at 13:25-14:1. If marijuana falls within
5 the exclusive jurisdiction of Title 56, this raises the question of whether the Board even
6 possesses the authority to remove marijuana from NAC 453.510, or whether this requires
7 an act by the Nevada Legislature.¹ Furthermore, NRS 453.2182 mandates that, in the
8 absence of any objection, the Board *shall* designate a substance consistent with federal law
9 without making the findings required by NRS 453.166. Marijuana remains a Schedule I
10 controlled substance under federal law, 21 CFR § 1308.11. The Board must navigate these
11 legal straits in an effort to comply with the Judgment and Order.

12 “Administrative agencies have only those powers which the legislature expressly or
13 implicitly delegates.” *Clark Cty. v. Equal Rights Comm'n*, 107 Nev. 489, 492, 813 P.2d
14 1006, 1007 (1991) (citing *Andrews v. Nevada State Board of Cosmetology*, 86 Nev. 207, 208,
15 467 P.2d 96, 96 (2007)). “Official powers of an administrative agency cannot be assumed by
16 the agency, nor can they be created by the courts in the exercise of their judicial
17 function. The grant of authority to the agency must be clear.” *Andrews*, 86 Nev. at 208,
18 467 P.2d at 97. If the Judgment and Order is upheld on appeal, this will clear the way for
19 the procedural housekeeping of removing marijuana from NAC 453.510. However, if the
20 Board is confronted with a legal challenge to its authority to deschedule marijuana while
21 the appeal pending, this will only murk the waters.

22 **B. Petitioners/Plaintiffs will suffer no irreparable injury if the stay is**
23 **granted.**

24 A stay will have no immediate nor irreparable impact on Petitioners/Plaintiffs
25 Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole. The Court ruled
26 that CEIC has associational standing, organizational standing and standing under the

27
28 ¹This is also seemingly incongruous given the absence of marijuana from the list of
substances that the Board is expressly prohibited from scheduling under NRS 453.2186.

1 public-importance doctrine on based upon CEIC’s efforts in assisting individuals with prior
2 cannabis-related criminal convictions, and that Poole has standing based upon his prior
3 felony conviction for possession of marijuana pursuant to NRS 453.336. Judgment and
4 Order at 2:6-20 and 9:16-10:14. Those prior convictions will not be affected by a stay.

5 **C. The Board presents a substantial case on the merits involving**
6 **serious legal questions.**

7 With regard to the merits of the Board’s appeal, the Nevada Supreme Court has
8 previously stated:

9 “[A] movant does not always have to show a probability of success on the
10 merits, the movant must ‘present a *substantial case* on the merits when a
11 serious legal question is involved and show that the balance of equities weighs
heavily in favor of granting the stay.”

12 *Hansen v. 8th Judicial Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v.*
13 *Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). This appeal concerns two
14 serious legal questions.

15 First, whether listing marijuana in Schedule I directly conflicts with Nev. Const. art.
16 4, § 38 or NRS 453.166(2), which turns upon whether the constitutional right of a patient
17 in Nevada to use marijuana “upon the advice of a physician” equates to marijuana having
18 “accepted medical use in treatment in the United States.”² Second, whether the Board
19 retains any authority to regulate substances subject to regulation pursuant to NRS Title
20 56, or if that authority was repealed by implication.³

23 ² The Nevada Supreme Court’s recent decision in *Ceballos v. NP Palace, LLC*, 138
24 Nev. Adv. Op. 58, 514 P.3d 1074 (2022), casts some level of doubt on this Court’s legal
25 conclusion that since Nevada falls within the geographical confines of the United States,
whether a substance has “accepted medical use in treatment in the United States” can be
determined solely under State law.

26 ³ In 1981 the Nevada Legislature empowered the Board of Pharmacy to designate,
27 by regulation, the substances to be contained in each schedule. See 1981 Nev. Stats. ch.
28 402 §§ 1-39 at 734-750; see also *Miller v. Jacobson*, 104 Nev. 600, 602, 763 P.2d 356, 357
(1988); *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985).

