

Case No. 85756

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 14 2023 05:01 PM
Elizabeth A. Brown
Clerk of Supreme Court

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

Appellant,

v.

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

Respondents.

**APPELLANT'S REPLY IN SUPPORT OF MOTION FOR STAY OF
JUDGMENT AND ORDER GRANTING PETITION FOR WRIT OF
MANDAMUS**

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Respondents agree with the Board on one key issue: the District Court preliminarily mooted the Board's appeal when it refused to stay its writ of mandamus. *See Opp.* at 3. The writ will permanently moot the Board's appeal if this Court also refuses to issue a stay. Because the writ will moot the Board's appeal absent a stay, there can be no dispute that the absence of a stay will defeat the object of the Board's appeal. *See* NRAP 8(c). Mooting the appeal is synonymous with defeating its object. As to other issues, Respondents dismissively proclaim that the Board cannot prevail on the merits. *See Opp.* at 7–8. They speculate that NAC 453.510 causes law enforcement to violate the rights of marijuana users. *See Opp.* at 4–5. They incorrectly argue that the Board waived arguments for failure to raise them in its motion, *see Opp.* at 9–10, and they undermine their claim to standing when they implicitly acknowledge that they offered no evidence at the hearing on the merits, *see Opp.* at 5. As explained below, the Board's affidavit does not supply the facts necessary to support Respondents' standing. *See Appx.* at 94–95.

As to Respondents' waiver argument, this Court independently evaluates the grounds for a stay, rendering waiver inapplicable. *See* NRAP 8(c). Further, the District Court committed plain error in granting writ relief that was unavailable to Respondents, thus violating separation of powers. Waiver is inapplicable because of the constitutional implications of the District Court's ruling. *See Desert-Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643, 600 P.2d 1189, 1190 (1979).

Regulations are presumptively lawful if they comply with the language of related statutes. *See Nev. Indep. v. Whitley*, 138 Nev. ___, 506 P.3d 1037, 1042 (2022). Unless a legislative enactment is unconstitutional, the courts have no discernable authority to order amendments to implementing regulations. *See id.* The District Court identified no conflicts between statutory and regulatory texts, nor between statutory texts and the Nevada Constitution. Additionally, the District Court failed to recognize that Nev. Const. art. 4, § 38 requires legislative implementation; it is not self-executing. *See Wren v. Dixon*, 40 Nev. 170, 195–96, 161 P. 722, 729 (1916) (constitutional provision is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law). By addressing NAC 453.510 in isolation with no statutory textual analysis, the District Court abandoned its duty to evaluate NAC 453.510 in the proper context.

Pursuant to NRS 34.160, a writ of mandamus was unavailable to Respondents because the Board’s regulation facially complies with all related legislation. There was no “manifest abuse of discretion” for failure to amend NAC 453.150. *See State v. Eighth Judicial Dist. Court of Nev.*, 138 Nev. ___, 521 P.3d 1215, 1220 (2022). The District Court violated separation of powers when it ordered the Board to amend an administrative regulation despite its consistency with related legislation. The District Court failed to recognize that NRS 453.146 and NRS 453.166-.219 delegate to the

Board the responsibility to schedule controlled substances using the same criteria that the U.S. Drug Enforcement Administration (“DEA”) applies when scheduling drugs under federal law. *See* 21 U.S.C. § 812. Consistent with state and federal law, the Board has listed marijuana as a Schedule I controlled substance. Under state law, the Board retains the authority to list marijuana under any of five statutory schedules and applies its pharmaceutical expertise to this task. *See* NRS 453.146 and NRS 453.166-.219. Furthermore, the scheduling of marijuana is unrelated to the right of a patient under Nev. Const. art. 4, § 38 to use marijuana “upon the advice of a physician.” A physician may advise a patient to use marijuana notwithstanding its Schedule I listing.

For regulatory purposes related to the practice of pharmacy, marijuana is properly classified as a “controlled substance” despite any ostensible clash with the opinion of a person’s physician. The Board does not interfere with the patient-physician relationship or the patient’s ability to obtain marijuana on the legal intrastate market. To the contrary, the Board regulates participants in the interstate market for pharmaceutical drugs. *See, e.g.,* NRS 453.226 (providing for the registration of healthcare practitioners); NRS 639.127 (providing for the registration of pharmacists); NRS 639.231 (providing for the licensure of pharmacies); NRS 639.233 (providing for the licensure of wholesalers and manufacturers); NRS 639.500 (providing authority to investigate interstate distributors).

Simply stated, the Board's regulatory activities complement the U.S. Food and Drug Administration's ("FDA") regulatory activities. Until the FDA approves a drug for manufacture, the drug cannot enter the pharmaceutical supply chain. *See* 21 U.S.C. § 355. If the Board's licensees and registrants cannot handle or distribute a controlled substance due to restrictions imposed by the FDA, the Board must impose similar restrictions as a means of protecting the integrity of pharmaceutical drugs as they flow through the stream of commerce into Nevada. *See* NRS 453.146; NRS 453.2182; NRS 453.2184. Unlike the Board, Respondents have no stake in the pharmaceutical supply chain. Their only interest is preventing unidentified people from being arrested, prosecuted, and incarcerated for marijuana-related crimes. However, the Board is not a law enforcement agency.

Although Respondents suggest there is a nexus between the Board and law enforcement, they do not coherently explain the alleged connection. *See* Opp. at 5. There is no nexus between NAC 453.510 and the statutory criminal penalties for producing, distributing, selling, or possessing marijuana outside of Nevada's legal intrastate market. For example, several statutes apply criminal penalties to transactions involving controlled substances other than marijuana. *See, e.g.*, NRS 453.322, NRS 453.3325, NRS 453.3353, NRS 453.3385. Other criminal statutes apply specifically to marijuana and its derivatives. *See, e.g.*, 453.336, NRS 453.339, NRS 453.3393. None of the "controlled substance" penalties incorporates the

Board's regulatory classification of marijuana; "marijuana" is defined in NRS 453.096 without reference to its regulatory listing as a controlled substance. Consequently, NAC 453.510 has no bearing upon the enforcement of criminal penalties related to marijuana.

Respondents suggest that the regulatory classification of marijuana has some relevance to gun crime. *See Opp.* at 5. In this regard, Nevada law imposes criminal penalties upon anyone who possesses a firearm while under the influence of a "controlled substance." *See NRS 202.257.* The District Court's ruling arguably narrows the legal definition of "controlled substance" to exclude marijuana consumed by persons who are at risk of committing gun violence. *See id.* The District Court's sweeping conclusion is contrary to public policy and ignores legislative intent and principles of statutory and constitutional interpretation. As it pertains to marijuana, will NRS 202.257 survive the District Court's haphazard regulatory amendments? As an administrative agency, the Board is not a proper party to defend the constitutionality or enforceability of NRS 202.257. If Respondents are aggrieved by the threat of unconstitutional arrests, prosecutions, and incarcerations, they must name a proper defendant in the case below. The Board's affidavit underscores this point. *See Appx.* at 94–95. The writ of mandamus in this case does not redress Respondents' alleged injury. It simply creates unnecessary confusion regarding the rights of criminal defendants.

For the above reasons, this Court should stay the District Court's order directing the Board to amend NAC 453.510 via textual interlineation and/or deletion. This was an order without judicial precedent. The Board will likely prevail on the merits of its appeal.

Respectfully submitted this 14th day of March 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on March 14, 2023.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

/s/ Gregory L. Zunino
An Employee of the Nevada Board of
Pharmacy