IN THE SUPREME COURT OF THE STATE OF NEVADA

Consolidated Case Nos. 85756 and 86128

THE STATE OF NEVADA BOARD OF PHARMACY,
a public entity of the State of Nevada,

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondents' arguments have morphed over time. At the District Court, Respondents offered sweeping generalities about the Nevada State Board of Pharmacy (Board) and its supposed efforts to regulate marijuana, thereby allegedly undermining the will of the voters. (JA Vol. 1 at 41–42). At that time, Respondents advanced the arguments that the *Nevada Medical Marijuana Initiative*, Nev. Const. art. 4, § 38, prohibited the continued listing of marijuana as a schedule I controlled substances, while the *Initiative to Regulate and Tax Marijuana* and subsequent enactment of NRS Title 56 completely negated the Board's statutory authority to schedule marijuana as a controlled substance. (*Id.*). With no textual analysis of either ballot initiative or subsequent implementing legislation, the District Court agreed. (JA Vol. 1 at 117–135). Eager to reach the merits, the District Court ignored Respondents' lack of standing. (JA Vol. 1 at 78–81).

On appeal, Respondents fail to bolster their claim to standing, and they argue that NRS 453.146 mandates—through use of the word "shall"—that the Board consider additional factors, including factors related to marijuana's biochemical properties, beyond the findings of federal authorities. (Ans. Br. at 16). Presumably, Respondents believe that the Board did not give sufficient weight to these additional factors.

Although this position is more reasonable than Respondents' original position, there is no evidence of record showing how the Board evaluates marijuana and marijuana derivatives when it periodically reviews the controlled substance schedules. There is no evidence of record because Respondents presented no evidence below. Excepting certain synthetic cannabinoids, *see* NAC 453.530(11), marijuana and its derivates continue to be listed as schedule I controlled substances, *see* NAC 453.510. To the extent that Respondents now acknowledge the Board's authority to schedule marijuana as a controlled substance, possibly under schedules III, IV, or V, their position conflicts with their original contention that the Board has no role to play in the regulation of marijuana. (JA Vol. 1 at 113). The District Court adopted Respondents' original position even though that position is indefensible. (JA Vol. 1 at 60).

II. ARGUMENT

A. RESPONDENTS' CLAIMS ARE NOT JUSTICIABLE.

1. RESPONDENTS CANNOT EXPLAIN THE CONNECTION BETWEEN THE BOARD'S SCHEDULING FUNCTION AND RESPONDENTS' ALLEGED INJURIES.

Respondents CEIC and Poole cannot identify an enforcement function that the Board exercises in relation to the CEIC, the CEIC's members, or Poole. Admittedly, the Board has *adopted* a regulation, NAC 453.510, that Respondents find objectionable on public policy grounds. (Ans. Br. at 13–14). The regulation arguably

conflicts with Respondents' mission to comprehensively decriminalize the possession, use, and sale of marijuana. (Ans. Br. at 28–29). However, the Board does not enforce the regulation against Respondents. The regulation does not impact the CEIC, the CEIC's members, or Poole in a way that causes them a cognizable legal injury. Further, it does not tie the hands of police and prosecutors as Respondents suggest. (Ans. Br. at 5).

The Nevada Legislature, not the Board, empowers law enforcement to investigate and prosecute certain offenses involving the possession, use, and sale of "controlled substances," including marijuana and other drugs that are lawfully classified as such by the Board. *See, e.g.,* NRS 453.146 (authorizing the Board to schedule drugs as controlled substances); NRS 453.316 (making it unlawful to open a place of business for transferring controlled substances except as authorized by law); NRS 453.331 (making it unlawful for a registrant to distribute a schedule I or schedule II controlled substance except as authorized by law); NRS 453.338 (making it unlawful for a person to possess for sale a schedule III, schedule IV, or schedule V controlled substance except as authorized by law).

In most cases, by legislative design, the unlawful possession, use, or sale of marijuana is subject to less severe criminal penalties than the unlawful possession, use, or sale of other controlled substances. *See* NRS 453.336(5) (persons in possession of more than one ounce but less than fifty pounds of marijuana are subject

to prosecution for a category E felony); *cf.* NRS 453.336(2)(c) (persons who possess 14 grams or more, but less than 28 grams, of a controlled substance listed in schedule I or schedule II, excepting marijuana, are subject to prosecution for a category C felony). *See also* NRS 453.339(1) (persons who unlawfully sell marijuana in large quantities are subject to prosecution for a category C felony); *cf.* NRS 453.321(2) (persons who sell *any* quantity of a controlled substance listed in schedule I or schedule II, excepting marijuana, are subject to prosecution for a category C felony).

In some cases, the unlawful consumption or distribution of marijuana is subject to the same criminal penalties as the unlawful consumption or distribution of other controlled substances. *See* NRS 202.257 (persons who possess firearms while under the influence of a controlled substance, including marijuana, are subject to prosecution for a misdemeanor); NRS 453.316 (unless otherwise authorized by law, persons who open or maintain a place for the purpose of selling, using, or giving away any controlled substance, including marijuana, are subject to prosecution for a category C felony). None of the foregoing statutes target marijuana offenses for prosecution *because of* marijuana's listing in schedule I. Generally, for purposes of criminal prosecution, marijuana is treated as a controlled substance without regard to its listing in any schedule. Furthermore, where the Nevada Legislature has determined that marijuana-related offenses merit more lenient treatment than

offenses involving other controlled substances, it has carved out exceptions for marijuana.

Broadly speaking, the Nevada Legislature has not legalized the *carte blanche* possession, use, or sale of marijuana, nor have the voters. Instead, Nevada law permits a limited legal cannabis market which is not mutually exclusive to the scheduling of marijuana as a controlled substance by the federal government or Nevada. Indeed, the Board's regulatory authority over marijuana is limited to listing it in one of the five schedules described at NRS 453.166, inclusive. This is a research function, not an enforcement function. *See* NRS 453.146; NRS 435.166–453.206; NRS 453.2182–453.2188. When police and prosecutors make arrest and charging decisions for controlled substance offenses, they have no reason to parse the schedules or the Board's determination that any given drug, including marijuana, qualifies for a particular schedule.

Pursuant to its grant of statutory authority, the Board has lawfully classified marijuana as a controlled substance. *See* NRS 453.146; NRS 435.166–453.206; NRS 453.2182–453.2188. The Board has done so without impeding Respondents' ability to pursue their goals in the criminal justice arena. Respondents argued below, and the District Court concluded, that marijuana cannot be classified as a "controlled substance" under any circumstances or for any purposes. The District Court's decision defies explanation, as it has no textual support in Nev. Const. art. 4, § 38 or

the Nevada Revised Statutes. As discussed below, the relevant laws firmly support the Board's authority to schedule marijuana as a controlled substance.

Further, Respondents' effort to strike marijuana from schedule I is untethered from its apparent goal of advancing its mission and the interests of its members. Where the Legislature has made limited exceptions for marijuana, it has done so with full knowledge of the Board's authority to schedule marijuana as a controlled substance. Police and prosecutors independently exercise discretion whether to investigate and/or prosecute marijuana-related offenses under applicable criminal statutes. To the extent that the Board's regulation informs the interpretation of certain criminal statutes, it is relevant only as a means of determining whether marijuana falls within the scope of prohibited activity involving controlled substances. Since marijuana is properly characterized as a controlled substance, marijuana's listing in schedule I, as opposed to schedules II through V, is unrelated to Respondents' alleged injuries.

If Respondents' objective is to remove marijuana from the controlled substance schedules altogether, they must make that request of the Nevada Legislature. [1] The Nevada Legislature has left drug scheduling decisions to the Board

[1] Similarly, if Respondents' ambition is to remove barriers to entry into the legal cannabis market, their remedy is with the Nevada Legislature. The Board's listing of marijuana as a schedule I controlled substance has no bearing upon the process for securing a license to operate a marijuana lounge, a dispensary, or a cultivation facility.

despite recurring opportunities—including during the 2023 session—to remove marijuana from the Board's authority to classify drugs using standardized nomenclature. To the extent that Respondents wish to destigmatize certain marijuana-related criminal convictions—assuming they carry a stigma aside from the usual stigma associated with a criminal conviction—only the Nevada Legislature can provide a potential remedy.

Alternatively, if Respondents' objective is to seal criminal convictions and/or secure pardons, they must make those requests through the proper channels. *See, e.g.,* NRS 179.245; Nev. Const. art. 5, § 14. Finally, if their aim is to reverse or collaterally attack a criminal conviction, they must pursue that remedy through a direct appeal and/or a petition for habeas corpus. *See Harris v. State*, 130 Nev. 435, 445, 329 P.3d 619, 626 (2014). Respondents' claims against the Board are non-justiciable because their alleged injuries are not related to any enforcement activity by the Board.

In summary, Respondents have failed to demonstrate that their alleged injuries are traceable to the Board's adoption of NAC 453.510. *See Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d 768, 770 (1988). Because they cannot explain the connection between the Board's adoption of NAC 453.510 and their alleged injuries, this controversy is nonjusticiable. *See Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225–226 (2006).

2. RESPONDENT CEIC DOES NOT HAVE ORGANIZATIONAL STANDING.

CEIC argues that it has organizational standing because it has been forced to divert resources in pursuit of its lawsuit against the Board. (Ans. Br. at 28). This is only true if the CEIC's mission is rationally connected to the Board's regulation listing marijuana as a schedule I controlled substance. *See* NAC 453.510. An organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Circuit 2010) (citation omitted). Concerning its mission, CEIC states: "The district court's order in CEIC's favor will redress [its] injuries by precluding at least those cannabis-related convictions that hinge on the Board's scheduling determination, and thus permitting CEIC to cease, or at least reduce, expenditures of money, time, and resources on helping individuals obtain pardons or seal their records." (Ans. Br. at 28).

However, Respondent CIEC fails to explain how any person's criminal conviction "hinges" on the Board's decision to list marijuana as a controlled substance. Every drug-related conviction is based upon the underlying conduct of the person convicted, and the way that a judge or jury evaluates that conduct in view of the law and the evidence presented at trial. Further, the Board's listing of marijuana as a controlled substance did not criminalize any conduct that was not

otherwise a crime under applicable statutes at the time of the conviction. A criminal conviction speaks for itself. More specifically, unless a conviction is reversed on appeal, or successfully challenged through a post-conviction petition for a writ habeas corpus, the conviction stands as conclusive proof of its own validity. *See Harris*, 130 Nev. at 445, 329 P.3d at 626. An amendment or modification to the Board's regulation cannot undo a person's criminal conviction once it is final. Moreover, Respondents fail to explain how such an amendment or modification would be relevant to an application for a pardon or a petition to seal criminal records.

As a matter of law, CEIC has diverted resources in pursuit of an abstract public policy determination. As a practical matter, CEIC's lawsuit is a backdoor attempt to nullify criminal statutes. Clearly, the Nevada Legislature enacted those statutes with the understanding that marijuana is appropriately classified as a controlled substance notwithstanding the adoption of Nev. Const. art. 4, § 38. Within the context of criminal proceedings, the Nevada judiciary has had numerous opportunities to rectify perceived injustices related to the adoption of Nev. Const. art. 4, § 38. To date, this Court has not reversed a single conviction on the ground that Nev. Const. art. 4, § 38 gives people *carte blanche* to use marijuana for medical purposes. *See, e.g., Aroz v. State*, 134 Nev. 908 (Unpublished Disposition 2018); *Baker v. State*, __Nev.__, 488 P.3d 579 (Unpublished Disposition 2021); *Miller v. State*, 125 Nev. 1062, 281 P.3d 1201 (Unpublished Disposition 2009).

CEIC's stated mission is arguably a pretext for a larger attack on Nevada's criminal justice system. If the mission of CEIC is to assist people in their efforts to destigmatize their criminal convictions, CIEC should logically expend its resources in pursuit of its efforts to seal their convictions and/or secure pardons on their behalf.[2] CEIC's lawsuit against the Board will not advance its purported mission; marijuana-related convictions will continue to carry a stigma by virtue of being criminal convictions. The CEIC has produced no evidence to suggest that the Board's regulation stigmatizes CEIC's members. If there is a stigma associated with a conviction, that stigma will persist regardless of the outcome of this case. Additionally, CEIC has not produced any evidence to suggest that the Board's regulation hinders CEIC's efforts to seal criminal records and secure pardons. CEIC has failed to explain how its lawsuit advances its purported mission of sealing criminal records and/or securing pardons for its members. Therefore, CEIC has failed to demonstrate that it has organizational standing.

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[2] Respondents argue that criminal convictions have "collateral consequences" for the persons convicted. (Ans. Br. at 9, 12, and 26). As their argument pertains to the Board, they presumably mean that criminal convictions carry a stigma. Indeed, there is no other conceivable explanation for their decision to sue the Board. The motive for their lawsuit remains unclear because the Board, unlike the Nevada Board of Pardons Commissioners, has no ability to blunt the tangible impact of a criminal conviction.

3. RESPONDENT CEIC DOES NOT HAVE REPRESENTATIONAL STANDING.

An organizational plaintiff may attempt to establish representational standing even if it has not suffered a cognizable economic injury. *See Nat'l Ass'n of Mut. Ins. Companies v. Dep't of Business and Indus.*, 139 Nev. Adv. Op. 3, 534 P.3d 470, 478 (2023). Here, CEIC does not have representational standing because its members do not have individual standing. Additionally, the remedy that CEIC seeks to obtain on their behalf—striking marijuana from the controlled substance schedules—is not relevant to CEIC's stated mission of assisting its members with criminal justice matters.

To demonstrate representational standing, CEIC must establish that: (1) its members would otherwise have individual standing to sue; (2) the interests it seeks to protect are relevant to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* CEIC fails to satisfy the first two parts of the analysis for evaluating representational standing. First, CEIC's members do not have standing to sue because their alleged injuries are not traceable to the Board's adoption of NAC 453510. *See Elley*, 104 Nev. at 416-17, 760 P.2d at 770. To further complicate the individual standing analysis, the nature of their alleged injury is unclear. On the one hand, it appears that CEIC's members may be concerned about the possibility of future arrests and prosecutions. (Ans. Br. at 29). On the other hand, CEIC indicates

that its members are concerned with the "collateral consequences" stemming from their prior marijuana-related convictions. (Ans. Br. at 9, 12, and 26).

Assuming the former, CEIC has not identified a single member who has been threatened with arrest or prosecution based upon marijuana's listing as a schedule I controlled substance. Nor has CEIC developed a plausible hypothetical that foreshadows such an arrest or prosecution. As discussed above, Nevada law generally treats marijuana-related offenses more leniently than offenses involving other types of controlled substances. It is highly improbable that any of CEIC's members will be arrested or prosecuted under a Nevada statute that specifically penalizes the possession, use, or sale of marijuana *because of* marijuana's listing as a schedule I controlled substance.

Further, as discussed above, CEIC's lawsuit against the Board is not germane to the organization's purpose because the lawsuit will not advance CEIC's stated mission of sealing criminal records and obtaining pardons for its members. To the extent that CEIC's members have been convicted of marijuana-related offenses, those convictions will stand regardless of whether marijuana remains a controlled substance after the conclusion of this case. Moreover, CEIC cannot attack the validity of a criminal conviction *via* the instant claims against the Board for a declaratory judgment and mandamus relief. *See Harris*, 130 Nev. at 445, 329 P.3d at 626. Ultimately, CEIC must seal court records and secure pardons on a case-by-

case basis based upon the facts of any given case under review. A favorable outcome in this case will not relieve CEIC of that burden. Accordingly, CEIC's interests are not germane to CEIC's ostensible purpose of sealing criminal records and securing pardons for its members. CEIC's claim to representational standing fails.[3]

4. RESPONDENTS' CLAIMS DO NOT QUALIFY FOR THE PUBLIC IMPORTANCE EXCEPTION TO THE STANDING DOCTRINE.

As Respondents observe, this Court has recognized an exception to the standing doctrine where a plaintiffs' claims present a matter of public importance. The plaintiff must establish, among other criteria depending upon the nature of the claims, that the plaintiff is an appropriate party to advance the claims, and that the claims implicate the separation of powers doctrine. *Nevada Policy Research Institute, Inc. v. Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1207–08 (2022). The plaintiff is an appropriate party to advance claims when the plaintiff asserts them against an adverse party. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894–95 (2016). Here, Respondents' claims do not implicate the separation of powers doctrine, and Respondents have not asserted them against an adverse party.

Concerning the separation of powers doctrine, Respondents falsely suggest that the Board has defied the will of the voters by listing marijuana as a schedule I controlled substance. (Ans. Br. at 31). By their rationale, the Board has usurped the

[3] For the reasons discussed herein, Poole's claim to individual standing also fails.

constitutional authority of the voters in a way that violates the separation of powers doctrine. (*Id.*). Respondents' argument reads nonexistent text into Nev. Const. art. 4, § 38, which provides in pertinent part as follows:

> The legislature shall provide by law for . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.

On its face, the above text memorializes the voters' intention to limit the use of marijuana to situations where it is medically recommended. Further, it expressly delegates implementing authority to the Nevada Legislature. In turn, the Nevada Legislature entrusts scheduling determinations to the Board.[4] By Respondents' own admission, the Board may, pursuant to statute, defer to the "findings of the federal Food and Drug Administration . . . or the Drug Enforcement Administration as prima facie evidence relating to one or more of the determinative factors in its scheduling decisions." (Ans. Br. at 16). The only debate in this case is whether the Board has given too much weight to the federal government's findings. (Ans. Br. 16–17). This

[4] Having recently passed a resolution urging Congress to reevaluate the federal position on marijuana, the Nevada Legislature has signaled its intention to maintain the *status quo* pending action by the federal government. *See* Assembly Joint Resolution No. 8 of the 82nd Session of the Nevada Legislature (2023). The resolution cannot reasonably be construed as an act of deference to a district court decision because district court decisions have no value as precedent in Nevada unless they are affirmed on appeal in a published decision. *See* NRAP 36(c). Respondents' argument to the contrary is incorrect. (Ans. Br. at 24).

debate has no connection to the separation of powers doctrine. It presents a question of administrative law without tangible consequences for Respondents.

As evidenced by Nevada's detailed statutory scheme and the federal government's criminal prohibition against the interstate distribution of marijuana, the Nevada Legislature has carefully considered the implications of the voters' decision to legalize the possession, use, and sale of marijuana for medical and recreational purposes. Broadly speaking, the Nevada Legislature has not legalized the possession, use, or sale of marijuana, nor have the voters. As relevant to this case, the Nevada Legislature has crafted a narrow accommodation for the voters' desire to purchase marijuana in a highly regulated setting for recreational or medical purposes. This accommodation is subject to strict regulatory controls on the cultivation, packaging, marketing, and sale of marijuana in intrastate commerce. *See* NRS Title 56. The Board's role is limited to classifying marijuana and its derivates under one of five schedules based upon statutory criteria. *See* NRS 453.146; NRS 435.166–453.206; NRS 453.2182–453.2188. In no way do the Board's classification decisions defy the will of the voters as expressed in Nev. Const. art. 4, § 38. To the contrary, the Board's scheduling determinations are fully consistent with the plain language of that provision.

Regarding the question of adversity, the Board has no ability to remedy the alleged injuries for which Respondents seek equitable relief—law enforcement

activity, arrests, criminal convictions, criminal records, and post-conviction outcomes. There is no adversity between Respondents and the Board because the Board does not enforce NAC 453.510 against Respondents. *See, e.g., Whole Woman's Health v. Jackson*, 595 U.S. __, 142 S. Ct. 522, 533–536 (2021) (action for declaratory and injunctive relief lacked adversity where defendant, judges, and court clerks had no enforcement functions). Here, Respondents trace their alleged injuries to *statutes* that criminalize the use, possession, and sale of contraband marijuana. But the Board does not enforce these statutes. Furthermore, as discussed above, the Board's decision to list marijuana under schedule I, as opposed to another schedule, has no discernable tangible consequences for Respondents.

Respondents are not pharmacists or physicians who seek to dispense marijuana outside of the dispensary system. They are not consumers who seek to acquire marijuana from sources other than licensed dispensaries. By their own admission, Respondents' alleged injuries arise from the law enforcement activities of police and prosecutors. The Board does not direct or supervise those law enforcement activities. Because the Board has no ability to remedy Respondents' alleged injuries, there is no adversity between Respondent and the Board. Having failed to name a law enforcement agency as a defendant, Respondents are not appropriate partes to advance the claims in this litigation. The public-importance exception to the standing doctrine is inapplicable.

B. RESPONDENTS' CLAIMS LACK MERIT.

1. NEVADA HAS NOT "LEGALIZED" MARIJUANA.

Despite Respondent's assertions to the contrary, marijuana is not "legal" in Nevada. Neither the *Nevada Medical Marijuana Initiative* nor the *Initiative to Regulate and Tax Marijuana*, or any of the subsequent implementing legislation, "legalized" marijuana and all marijuana-related activities. In reality, Title 56 exempts from criminal prosecution certain marijuana-related activities that remain illegal under Nevada law when those activities fall outside the scope of applicable exemptions. (JA Vol. 1 at 089-090, 095-097). *See, e.g., In re O.S.*, 112 N.E.3d 621, 633-34 (Ill. App. Ct. 2018) ("decriminalization is not synonymous with legalization"); *State v. Menditto*, 110 A.3d 410, 415-16 (Conn. 2015) ("decriminalization [means] something short of full legalization"); *State v. Senna*, 79 A.3d 45, 49-50 (Vt. 2013) (distinguishing decriminalization from exemption from prosecution). As discussed above, Nev. Const. art. 4, § 38 delegates to the Nevada Legislature the responsibility of delineating between lawful and unlawful use, while the *Initiative to Regulate and Tax Marijuana* itself delineated between lawful and unlawful use.

Because marijuana is not "legal" in Nevada in most contexts, including in the context of pharmaceutical distribution, the Board retains jurisdiction to schedule marijuana and marijuana derivatives as controlled substances in conformance with

NRS Chapter 453. The Board's regulatory authority under the chapter is narrowly confined to the function of scheduling: it does not regulate the legal production, distribution and use of marijuana under Title 56, and it does not enforce state criminal laws punishing illegal possession, use, and distribution. (JA Vol. 1 at 98-100). *See* NRS 453.146(1) ("The Board shall administer the provisions of NRS 453.011 to 453.552, inclusive, and may add substances to or delete or reschedule all substances enumerated in schedules I, II, III, IV and V by regulation."). Respondents' arguments that marijuana has been "legalized" in Nevada, and the Board's authority to schedule marijuana consequently repealed by implication, are incompatible with the text of the very constitutional and statutory provisions upon which Respondents rely. Ultimately, the plain text of the law vindicates the Board's position in this case.

2. NEV. CONST. ART. IV, § 38 DOES NOT CONFER ACCEPTANCE FOR MEDICAL USE IN TREATMENT IN THE UNITED STATES.

Despite passage of the *Nevada Medical Marijuana Initiative*, marijuana is not "currently accepted for medical use in treatment in the United States" as contemplated under the scheduling criteria of NRS Chapter 453. The District Court's ruling—that acceptance for medical use in treatment in the United States must be determined solely by reference to Nevada's "geographic" boundaries—renders the statutory scheduling scheme meaningless and places Nevada law in direct opposition

to federal law. *See* NRS 453.146; NRS 435.166–453.206; NRS 453.2182–453.2188. This is clearly not what the Nevada Legislature intended when it enacted NRS Title 56.

Marijuana's current listing in schedule I under federal law (*see* 21 CFR § 1308.11), together with the most recent positions of the U.S. Department of Health and Human Services, National Academies of Sciences, Engineering, and Medicine, American Medical Association and American Psychiatric Association, reflect the current national consensus within the scientific and medical community. (JA Vol. 1 at 092-095). Respondents suggest that Nevada should ignore this national consensus as a handful of other states have done. (Ans. Br. at 18). While this is conceivably an option for Nevada, it is ultimately the Nevada Legislature's decision whether to amend NRS chapter 453 in a way that legislatively confers medical acceptance upon marijuana. The District Court erred as a matter of law when it concluded that marijuana is currently accepted for medical use in treatment in the United States. (JA Vol. 1 at 127–128). *See Ceballos v. NP Palace, LLC*, 138 Nev. Adv. Op. 58, 514 P.3d 1074, 1077–78 (2022) (holding that "lawful in this state" refers to both state and federal law).

Additionally, the administration of U.S. President Joe Biden recently announced that the U.S. Department of Health and Human Services has issued a new recommendation that the U.S. Drug Enforcement Administration reschedule

marijuana to schedule III.[5] That recommendation and the study behind it are not yet public; however, if marijuana is scientifically determined to have an accepted medical use in treatment in the United States and eventually rescheduled, the Board will follow its statutory mandate and initiate a review of marijuana's listing in NAC 453.510. *See* NRS 453.146; 453.2182. However, speculation cannot provide a compelling reason for the Board to reschedule marijuana at this time.

3. MARIJUANA REMAINS A SCHEDULE I CONTROLLED SUBSTANCE WITHOUT THWARTING THE WILL OF THE VOTERS.

By focusing their arguments exclusively on matters of criminal justice, Respondents impliedly acknowledge that the continued listing of marijuana in schedule I has no impact upon the public's ability to acquire and use marijuana for a medical purpose upon the advice of a physician. Therefore, according to the plain language of Nev. Const. art. 4, § 38, the voters have fully realized the rights and privileges conferred by that amendment to the Nevada Constitution. Nor has the continued listing of marijuana in schedule I prevented anyone from engaging in the recreational use of marijuana in conformance with the *Initiative to Regulate and Tax Marijuana*. Therefore, there can be no constitutional or statutory violation from the continued listing of marijuana in schedule I. The District Court failed to grapple

[5]*See* Statement of President Biden on Marijuana Reform, White House Press Release dated October 6, 2022, available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ (last accessed 10/23/2023).

with this unavoidable conclusion. Instead, it went searching for a grand solution to a manufactured problem.

Even if the District Court had genuine doubts about the Board's assessment of the utility of marijuana as a pharmaceutical drug, it would have done well to follow the lead of the 2023 Nevada Legislature. As previously noted, the Nevada Legislature passed a resolution urging Congress to reevaluate marijuana's schedule I listing. *See* Assembly Joint Resolution No. 8 of the 82nd Session of the Nevada Legislature (2023). Additionally, it enacted Section 16 of Senate Bill 277, which provides in relevant part:

> The Cannabis Advisory Commission created by NRS 678A.300 shall conduct a study concerning the potential effects on the cannabis industry in this State **if cannabis were to be removed from the list of controlled substances included in schedule I** pursuant to the Uniform Controlled Substances Act or the federal Controlled Substances Act.

Section 16 of Senate Bill. No. 277 of the 82nd Session of the Nevada Leglislature (2023) (emphasis added).

The Nevada Legislature's activity in 2023 begs the following questions: Why would the Nevada Legislature in 2023 commission a study on the potential impact of removing marijuana from NAC 453.510 at some point in the future if this had already occurred by passage of the *Nevada Medical Marijuana Initiative* in 2000? Why would the Nevada Legislature urge Congress to reevaluate the schedule I listing

for marijuana if, as the District Court held, Nevada law supersedes federal law with respect to marijuana?

The District Court's decision is detached from principles of federalism and rules of statutory construction. Accordingly, Respondents' defense of the District Court decision lacks merit. In a nutshell, the District Court's decision purports to liberate Nevada from any obligation to adhere to federal law as it governs the distribution of marijuana. To a degree, Nevada must respect federal scheduling determinations as they relate to interstate distribution of marijuana. This is evidenced by Nevada statutory law as discussed above. The Board acted within its statutory authority and discretion when it listed marijuana under schedule I. The District Court's decision is clearly erroneous.

C. RESPONDENTS CANNOT RECOVER FEES.

The District Court awarded fees pursuant to NRS 34.270. This provision applies when a petitioner prevails in an action for *mandamus* relief. *Mandamus* is inapplicable to the facts of this case. *Mandamus* relief is available "to compel the performance of an act which the law requires as a duty resulting from an office or where the discretion has been manifestly abused or exercised arbitrarily or capriciously." *Hildt v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 12, 483 P.3d 526, 529 (2021) (citation omitted). "[M]andamus will not issue unless the petitioner can show that the respondent has a clear, present legal duty to act." *Howell v. Ricci*,

124 Nev. 1222, 1228, 197 P.3d 1044, 1049 (2008) (citations and internal quotation marks omitted). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of law." *See State v. Eighth Judicial Dist. Court (Schneider)*, 132 Nev. 600, 604, 376 P.3d 798, 801 (2016) (citation omitted).

As the above cases illustrate, the Board is not subject to a writ of *mandamus* absent a credible finding that the Board acted with a measure of culpability. In short, the Board is not subject to *mandamus* relief unless the Board manifestly abused its discretion, acted in an arbitrary or capricious manner, or abandoned its duty to act in a neutral, unbiased fashion. *See id.* There is no evidence of record from which the District Court could have made the necessary finding of culpability.

Ultimately, the District Court's decision was based upon a strained interpretation of Nev. Const. art. 4, §38. The Board could not possibly have foreseen that the District Court would interpret Nev. Const. art. 4, §38 as negating the Board's statutory authority to schedule marijuana as a controlled substance. Further, Respondents never petitioned the Board to consider removing marijuana from schedule I as authorized by NRS 233B.100. In short, the Board was blindsided by Respondents' lawsuit. Under the circumstances, the Board did not manifestly abuse its discretion, act in an arbitrary or capricious fashion, or abandon its neutrality.

Mandamus is inapplicable, and there is no evidence of record to the contrary. Accordingly, Respondents are not entitled to recover their fees.

III. CONCLUSION

Respondents have failed to demonstrate their standing to sue the Board for having adopted NAC 453.510. Assuming they have demonstrated their standing, they have failed to make a cogent argument in support of their position that Nev. Const. art. 4, §38, or the *Initiative to Regulate and Tax Marijuana*, negates the Board's statutory authority to schedule marijuana as a controlled substance. The District Court's decision should be reversed.

Respectfully submitted this 2nd day of November 2023.

By:*/s/ Gregory L. Zunino*

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CERTIFICATE OF COMPLIANCE

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Nevada Rules of Appellate Procedure, specifically NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of November 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9.

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/ Peter Keegan
General Counsel
Nevada State Board of Pharmacy