

1 **ORDER**

2 **EIGHTH JUDICIAL DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

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

7 Petitioners/Plaintiffs,

8 vs.

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

12 Respondent/Defendant.

Case No.: A-22-851232-W
Dept No.: XV

13 **JUDGMENT AND ORDER GRANTING PETITION FOR WRIT OF MANDAMUS**
14 **AND REQUEST FOR DECLARATORY RELIEF**

15 This matter having come before this court on September 14, 2022, on Petitioners/Plaintiffs'
16 Petition for Writ of Mandamus and Request for Declaratory Relief; Christopher M. Peterson, Esq.,
17 and Sophia A. Romero, Esq., of the American Civil Liberties Union of Nevada, appearing on behalf
18 of Petitioners/Plaintiffs, Cannabis Equity and Inclusion Community (CEIC) and Antoine Poole
19 (collectively "Petitioners"); Brett Kandt, Esq. and Peter K. Keegan, Esq., appearing on behalf of the
20 State of Nevada ex rel. Board of Pharmacy ("Board" or "Respondent"); the Court having reviewed
21 the papers and pleadings on file herein, having heard the arguments of counsel, upon agreement of
22 counsel that this matter is ready to be decided upon the pleadings without trial, and with good cause
23 appearing, the Court hereby finds, concludes, and orders as follows:

24 This ruling is limited to the Petition and Complaint in front of the Court and only addresses
25 the issues of (1) whether the scheduling of cannabis as a Schedule I substance is in conflict with the
26 Article 4, Section 38 of the Constitution of the State of Nevada; (2) whether cannabis must be
27 removed from the listing of Schedule I substances; and (3) whether, in light of the enactment of NRS
28 Title 56, the Board of Pharmacy has any authority to schedule cannabis as a controlled substance.

1 The parties agreed and stipulated that the issues raised may be decided as a matter of law by
2 the Court. The first two issues were adjudicated at the time of hearing, this Court reserved ruling on
3 the third issue upon submission of competing orders. To the extent the briefing addressed any
4 additional issues, the Court declines to rule and this Order shall constitute a final judgment.

5 **FINDINGS OF FACT**

6 Plaintiff CEIC is, and was at all times relevant herein, a domestic nonprofit corporation
7 organized and existing under and by virtue of the laws of the State of Nevada. Based upon its
8 uncontroverted declaration, CEIC advocates for freedom, equity, and opportunity in Nevada's
9 cannabis market by supporting people from underrepresented communities as they apply for licenses
10 to participate in the legal cannabis market. CEIC has also dedicated resources to mitigating
11 Nevada's long history of prosecuting cannabis-related offenses by assisting individuals with prior
12 cannabis-related criminal convictions in applying for pardons and sealing criminal records. CEIC
13 continues to engage in community outreach to identify these individuals and organize record sealing
14 workshops.

15 Plaintiff Antoine Poole is, and was at all times relevant herein, a resident of the State of
16 Nevada, County of Clark, City of Las Vegas. Based upon his uncontroverted declaration, Mr. Poole
17 was adjudicated guilty in the Eighth Judicial District Court of the State of Nevada of Possession of
18 Controlled Substance, a Category E Felony pursuant to NRS 453.336, for possession of marijuana.
19 This adjudication occurred on April 20, 2017, after cannabis was legalized for both medical and
20 recreational use in Nevada.

21 Respondent/Defendant, Nevada State Board of Pharmacy, is a public entity of the State of
22 Nevada with the power to sue and be sued, pursuant to NRS 12.105 and NRS 41.031.

23 The transactions and occurrences that give rise to the Petitioners' claims against Respondent,
24 the Nevada State Board of Pharmacy, occurred in the City of Las Vegas, Clark County, Nevada.

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1 In 1923, the Nevada Legislature banned marijuana,¹ making even simple possession,
2 regardless of purpose, a criminal offense.² When the Legislature enacted the Uniform Controlled
3 Substances Act in 1971, marijuana was classified as a Schedule I substance.³ In 1981, the Nevada
4 Legislature delegated to the Nevada Board of Pharmacy authority to designate, by regulation and
5 within limits prescribed by the Legislature, what substances would be listed on Nevada's schedules
6 of controlled substances.⁴ Since then the Board categorized, and still categorizes, marijuana,
7 cannabis, and cannabis derivatives as Schedule I substances under NAC 453.510. By classifying
8 marijuana, cannabis, and cannabis derivatives as Schedule I substances, the Board denies that
9 marijuana has "accepted medical use in treatment in the United States."

10 The Board's authority to categorize a substance as Schedule I is limited by the conjunctive
11 test set forth in NRS 453.166, which states:

12 The Board shall place a substance in schedule I if it finds that the
13 substance:

- 14 1. Has high potential for abuse; *and*
- 15 2. Has no accepted medical use in treatment in the United
16 States or lacks accepted safety for use in treatment under medical
17 supervision.

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19 ¹ "Marijuana" and "cannabis" are used interchangeably and have the same meaning. NRS 453.096
20 defines marijuana as: "(a) All parts of any plant of the genus *Cannabis*, whether growing or not; (b)
21 The seeds thereof; (c) The resin extracted from any part of the plant; and (d) Every compound,
22 manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin." NRS 678A.085,
under Chapter 678A- Administration of Laws Related to Cannabis, states that cannabis has the
meaning ascribed to the term "marijuana" in [NRS 453.096](#).

23 ²An Act to Regulate the Use, Supply and Possession of Narcotic Drugs in the State of Nevada, and
24 to Provide Penalties for the Violation Thereof, Nev. Compiled Laws §§ 5084-5085 (1929) (repealed
1937).

25 ³See Section 31 of Assembly Bill No. 107 (1971 Nev. Leg. Session).

26 ⁴See 1981 Nev. Stats. ch. 402 §§ 1-39 at 734-750; *see also Miller v. Jacobson*, 104 Nev. 600, 602,
27 763 P.2d 356, 357 (1988); *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110
28 (1985)

(Emphasis added). Several Nevada Revised Statutes reference the classifications designated by the Board to criminalize activities related to controlled substances.⁵

In 1998, Nevada voted on and passed the *Nevada Medical Marijuana Act*, a ballot initiative intended to amend the Nevada Constitution to legalize marijuana for medical use in Nevada.⁶ Successful passage of the *Nevada Medical Marijuana Act* resulted in the addition of Article 4, Section 38, of the Nevada Constitution, which states:

1. The legislature shall provide by law for:

(a) The 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

⁵ For example, NRS 453.337 makes it unlawful to possess for sale any amount of a Schedule I substance. Penalties for violating NRS 453.337 are based on whether the offender is a subsequent offender, with the first offense being a Category D felony. Because marijuana is classified as a Schedule I substance, it is a Class D felony to possess *any* amount of marijuana for sale. To put this into perspective, if an individual sells even a tenth of a gram of marijuana without a license, they would be charged with a Class D felony for their first offense and even steeper penalties for any subsequent sales. This is a dramatic departure from marijuana being treated like alcohol given that an individual selling any amount of alcohol without a license is simply fined for selling alcohol without a license. *See* NRS 364.150.

As another example, NRS 453.336 criminalizes possession of a controlled substance not for purpose of sale. It states, “[a] person who violates this section shall be punished for the first or second offense, if the controlled substance is listed in schedule I, II, III or IV, for a category E felony as provided in NRS 193.130.” Because marijuana was not legalized for individuals under 21 years of age and it is classified as a Schedule I substance, NRS 453.336 is being used to charge juveniles and persons under 21 years old with felony offenses for possessing concentrated cannabis. Such actions are a clear circumvention to the legislature’s recent passing of AB158 which makes possession of one ounce or less of marijuana by a juvenile a citable offense. *See* Nev. Legis. AB 158 Reg. Sess. 2021.

In another, when looking in the context of prohibitions against possession of firearms, NRS 202.360 “[prohibits any person to] have in his or her possession or under his or her custody or control any firearm if the person is an unlawful user of, or addicted to, any controlled substance.” Again, because marijuana is classified as a Schedule I substance, an individual who is addicted to marijuana would be prohibited from possessing a firearm.

⁶ Scott McKenna, *Medical Marijuana Laws in the Silver State*, 6 Nevada Lawyer, Aug. 10, 2002.

1 disorders characterized by seizure; multiple sclerosis and other
2 disorders characterized by muscular spasticity; or other
conditions approved pursuant to law for such treatment.

3 (b) Restriction of the medical use of the plant by a minor to
4 require diagnosis and written authorization by a physician,
5 parental consent, and parental control of the acquisition and use
of the plant.

6 (c) Protection of the plant and property related to its use from
7 forfeiture except upon conviction or plea of guilty or nolo
8 contendere for possession or use not authorized by or pursuant to
this section.

9 (d) A registry of patients, and their attendants, who are
10 authorized to use the plant for a medical purpose, to which law
enforcement officers may resort to verify a claim of authorization
and which is otherwise confidential.

11 (e) Authorization of appropriate methods for supply of the plant
12 to patients authorized to use it.⁷

13 The Nevada Legislature followed this constitutional mandate by passing Assembly Bill 453 (2001).

14 In 2016, Nevada voted on and passed the *Initiative to Regulate and Tax Marijuana*, which
15 legalized possession of marijuana for recreational purposes.⁸ The initiative intended to “better focus
16 state and local law enforcement resources on crimes involving violence and personal property”
17 rather than prosecuting marijuana offenses.⁹ The *Initiative* explicitly stated that it intended for
18 marijuana to be “regulated in a manner similar to alcohol.”¹⁰ In addition to legalizing the use of
19 cannabis for recreational purposes, the *Initiative* prescribed the regulatory regime that would oversee
20 the market for both recreational and medical cannabis, naming the Nevada Department of Taxation
21 as the prime regulatory agency.

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24 ⁷ Nevada Const. art. IV, § 38.

25 ⁸ *Initiative to Regulate and Tax Marijuana*, Nevada Secretary of State, 1 (April 23, 2014),
26 <https://www.nvsos.gov/sos/home/showdocument?id=3294>.

27 ⁹ *Id.*

28 ¹⁰ *Id.*

1 In 2019, the Nevada Legislature passed NRS Title 56, titled “Regulation of Cannabis”, to
2 codify and clarify the *Initiative*. In four chapters, NRS Chapters 678A-D, the Legislature created a
3 comprehensive regulatory regime for the new cannabis industry, tasking the Cannabis Compliance
4 Board with heading the regime while explicitly authorizing specific Nevada state agencies and
5 subdivisions to regulate all aspects of the cannabis industry. The Nevada State Board of Pharmacy
6 was not referenced in any capacity nor explicitly authorized to participate in the regulatory regimes
7 prescribed by the *Initiative* or NRS Title 56.

8 Pursuant to the Petition, Petitioners/Plaintiffs requested that this Court resolve the
9 discrepancies between Article 4, Section 38, of the Nevada Constitution, NRS 453.166, and NAC
10 453.510 by declaring that: (1) the classification of marijuana, cannabis, and cannabis derivatives as
11 Schedule I substances violates Article 4, Section 38, of the Nevada Constitution or in the alternative
12 the classification of marijuana, cannabis, and cannabis derivatives as Schedule I substances violates
13 NRS 453.166; (2) the Nevada State Board of Pharmacy acted outside of its authority when it
14 classified, or failed to remove, marijuana, cannabis, and cannabis derivatives; and (3) the Nevada
15 State Board of Pharmacy must remove marijuana, cannabis, and cannabis derivatives as Schedule I
16 substances under NAC 453.510(4), NAC 453.510(9), and NAC 453.510(10).

17 **CONCLUSIONS OF LAW REGARDING IMMEDIATE RULING**

18 As the transactions and occurrences that give rise to the Petitioners’ claims against
19 Respondent, the Nevada State Board of Pharmacy, occurred in the City of Las Vegas, Clark County,
20 Nevada, and the Respondents operate and/or reside in Clark County, this Court has the authority to
21 grant the writ relief requested herein pursuant to NRS 34.160. Additionally, this Court has original
22 subject matter jurisdiction over this request for declaratory and injunctive relief under Article 6,
23 Section 6, of The Constitution of the State of Nevada.¹¹ Venue is proper in this Court pursuant to
24 NRS 13.020 and 13.040 because the cause, or some part thereof, arose in the City of Las Vegas,
25 Clark County, Nevada.

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28 ¹¹ See also NRS 30.030 (Uniform Declaratory Judgments Act).

1 Writ relief is an extraordinary remedy, and therefore, it is within a court’s sound discretion
2 whether to grant such relief.¹² “Extraordinary writ relief may be available where there is no ‘plain,
3 speedy and adequate remedy in the ordinary course of law.’”¹³ However, even when a legal remedy
4 is available, the court can “still entertain a petition for writ ‘relief where the circumstances reveal
5 urgency and strong necessity.’”¹⁴ A writ of mandamus may be issued by the court “to compel the
6 performance of an act which the law especially enjoins as a duty resulting from an office, trust or
7 station; or to compel the admission of a party to the use and enjoyment of a right or office to which
8 the party is entitled and from which the party is unlawfully precluded by such inferior tribunal,
9 corporation, board or person,” when there is no plain, speedy, and adequate remedy in the ordinary
10 course.¹⁵ The court must examine each request for writ relief individually.¹⁶ The court will generally
11 exercise its discretion to consider an extraordinary writ where an important legal issue that needs
12 clarification is raised or to promote judicial economy and administration.¹⁷ When a petition for
13 extraordinary relief involves a question of first impression that arises with some frequency, the
14 interests of sound judicial economy and administration favor consideration of the petition.¹⁸

16 ¹² *Segovia v. Eighth Judicial Dist. Court*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017).

17 ¹³ *Id.*, quoting NRS 34.170 and NRS 34.330).

18 ¹⁴ *Id.*, quoting *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104, 111, 979 P.2d 216, 220
19 (1999)).

20 ¹⁵ “The writ may be issued by ... a district court or a judge of the district court, to compel the
21 performance of an act which the law especially enjoins as a duty resulting from an office, trust or
22 station; or to compel the admission of a party to the use and enjoyment of a right or office to which
23 the party is entitled and from which the party is unlawfully precluded by such inferior tribunal,
corporation, board or person. When issued by a district court or a judge of the district court it shall
be made returnable before the district court.” NRS 34.160; NRS 34.170.

24 ¹⁶ *Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

25 ¹⁷ *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392
26 P.3d 170, 172 (2017).

27 ¹⁸ *A.J. v. Eighth Judicial District Court in and for County of Clark*, 2017, 394 P.3d 1209, 133 Nev.
28 202, [quoting](#) *Cote H. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 124 Nev. 36, 175 P.3d 906 (2008).

1 Under the Nevada Uniform Declaratory Judgments Act, NRS 30.010 to 30.160, this Court
2 has the power to declare the rights, status, and other legal relations of the parties whether or not
3 further relief is or could be claimed, and a declaration may be either affirmative or negative in form
4 and effect, and such declarations have the force and effect of a final judgment or decree.¹⁹ More
5 specifically, with respect to contracts, statutes, and other writings, NRS 30.040(1) provides:

6 Any person interested under a deed, written contract or other
7 writings constituting a contract, or whose rights, status, or other
8 legal relations are affected by statute, municipal ordinance,
9 contract or franchise, may have determined any question of
10 construction or validity arising under the instrument, statute,
11 ordinance, contract or franchise and obtain a declaration of rights,
12 status or other legal relations thereunder.

13 The provisions of the Act are to be liberally construed and administered, and are intended to be
14 remedial, in order to settle and to afford relief from uncertainty and insecurity with respect to rights,
15 status and other legal relations.²⁰ Such declarations have the force and effect of a final judgment or
16 decree.²¹ This matter satisfies the four elements that must be met for declaratory relief to be granted,
17 as described below.²² The facts stated above herein reveal a justiciable controversy in which a claim
18 of right is asserted against one who has an interest in contesting it. The controversy is between
19 persons whose interests are adverse. The issue involved in the controversy is ripe for determination
20 as individuals continue to be prosecuted for violating Nevada statutes which rely on the scheduling
21 of marijuana, cannabis, and cannabis derivatives as Schedule I substances, and CEIC must continue
22 to expend resources remedying such actions.

23 Because there is no requirement that Petitioners/Plaintiffs exhaust any administrative
24 remedies directly with the Board of Pharmacy, and in light of the holding in *State Bd. Of Parole*

25 ¹⁹ See NRS 30.030.

26 ²⁰ See NRS 30.140.

27 ²¹ NRS 30.030.

28 ²² *Kress v. Corey*, 65 Nev. 1, 25–26, 189 P.2d 352, 364 (1948).

1 *Comm’rs v. Second Judicial Dist. Court*,²³ a Writ of Mandamus and Complaint for Declaratory
2 Relief are appropriate vehicles for seeking redress in this matter.

3 This Court has subject matter jurisdiction, pursuant to NRS 34.160 and Article 6, Section 6
4 of the Nevada Constitution, to determine the legal questions at hand, specifically whether (1) the
5 Constitution of the State of Nevada, Article 4, Section 38, and NRS 143.166 precludes the Board of
6 Pharmacy from scheduling cannabis, as defined by NRS 453.096 pursuant to NRS 678A.085, as a
7 Schedule I substance and (2) after the passage of the *Initiative to Regulate and Tax Marijuana* and
8 the subsequent enactment of NRS Title 56 by the Nevada State Legislature, the Nevada State Board
9 of Pharmacy retained its authority to regulate cannabis.

10 *I. Standing*

11 A petitioner has standing in a proceeding on an extraordinary writ when the petitioner has a
12 “beneficial interest” in obtaining writ relief. “[A] beneficial interest sufficient to pursue a
13 mandamus action” is a “substantial interest that falls within the zone of interests to be protected by
14 the legal duty asserted.”²⁴ In other words, the writ of mandamus must be denied if the petitioner will
15 gain no direct benefit from its issuance and suffer no direct detriment if it is denied.²⁵

16 CEIC has organizational standing in this matter because (1) its organizational mission was
17 frustrated and (2) it had to divert resources to combat the particular injurious behavior in question.²⁶
18 If the writ of mandamus is denied, CEIC will continue to suffer these detriments, and if it is granted,
19 it will gain a direct benefit. Furthermore, CEIC has associational standing in this matter because (1)

21 ²³451 P.3d 73, at 76 (2019) (“But the Pardons Board cannot answer the legal question presented in
22 this matter, as that is a matter for the courts.”)

23 ²⁴ *Id.* at 460-61 (citing *Lindelli v. Town of San Anselmo*, 111 Cal.App.4th 1099, 4 Cal.Rptr.3d 453,
461 (2003)).

24 ²⁵ *Id.* (citing *Waste Management v. County of Alameda*, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740,
25 747 (2000)).

26 ²⁶ “An organization may satisfy the [Article III](#) requirement of injury in fact if it can demonstrate: (1)
27 frustration of its organizational mission; and (2) diversion of its resources to combat the particular
28 housing discrimination in question.” *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th
Cir. 2004).

1 its members would otherwise have standing to sue in their own right; (2) the interests it seeks to
2 protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief
3 requested requires the participation of individual members in the lawsuit.²⁷ Finally, because the
4 issues before the Court question whether an executive branch agency engaged in regulatory
5 rulemaking outside of the authority granted to the agency pursuant to the Nevada Constitution and
6 statute, the issues are fundamentally about separation-of-powers between the branches of Nevada's
7 government,²⁸ and CEIC has standing pursuant to the public-importance doctrine as described in
8 *Nev. Pol'y Rsch Inst., Inc., v. Cannizarro*, 507 P.3d 1203 (2022).

9 Antoine Poole, a Nevada resident who has been convicted under the Nevada Revised Statutes
10 of a controlled substance-related offense after the legalization of cannabis in Nevada and who
11 continues to experience collateral consequences because of his conviction, has a direct and
12 substantial interest in obtaining writ relief in this matter.

13 Plaintiffs have standing in this matter as set forth in this Court's order dated July 26, 2022,
14 which is based upon the uncontroverted declarations of the Plaintiffs.

15 *II. Article 4, Section 38 of the Constitution of the State of Nevada*

16 This Court has a duty not to create law or policy but rather to interpret the law including the
17 constitutionality of statutes, statutory schemes, and regulations. Additionally, this Court is beholden
18 to the laws of the State of Nevada, especially those set forth in the Constitution of the State of
19 Nevada. Here Petitioners/Plaintiffs have no plain, speedy and adequate remedy in the ordinary
20 course of law, and there is no other legal method to challenge the Board's misclassification of

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22 ²⁷ “[W]e have recognized that an association has standing to bring suit on behalf of its members
23 when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it
24 seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the
25 relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington*
State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *Greater*
Birmingham Ministries v. Sec'y of State for State of Alabama, 992 F.3d 1299, 1316 (11th Cir. 2021).

26 ²⁸ *See Roberts v. State*, 104 Nev. 33, 36-40 (1988) (finding that agency regulation invalidated due to
27 falling outside the agency's authority violated the separation-of-powers doctrine); *West Virginia v.*
28 *EPA*, 142 S. Ct. 2587, 2609 (2022) (finding that invalid EPA regulation implicated separation-of-
powers doctrine).

1 marijuana, cannabis, and cannabis derivatives as Schedule I substances. Thus, relief pursuant to a
2 writ of mandamus is appropriate.

3 Article 4, Section 38 of the Nevada Constitution, “Use of Plant of genus Cannabis for
4 medical purposes,” specifically refers to the use of cannabis by a patient, upon the advice of a
5 physician, for the treatment or alleviation of various medical conditions, recognizing under Nevada
6 law that there is an accepted use of cannabis for medical treatment.

7 Regulations passed by the Board of Pharmacy, including the designation of substances as
8 Schedule I pursuant to the agency’s rulemaking authority, cannot violate the Nevada Constitution.
9 The Nevada Legislature, through NRS 453.211(1)(a), has conferred a duty upon the Board of
10 Pharmacy to follow NRS 453.166 when classifying substances as Schedule I substances. Under NRS
11 453.166, the Board of Pharmacy may only designate a substance as a Schedule I substance if it
12 determines that the substance “has high potential for abuse *and* has no accepted medical use in
13 treatment in the United States or lacks accepted safety for use in treatment under medical
14 supervision.” (Emphasis added). The Board of Pharmacy is mandated to review the schedule
15 annually and maintain a list of current schedules.²⁹ Given the mandate that the Board review the
16 schedule annually, its failure to remove marijuana, cannabis, and cannabis derivatives as Schedule I
17 substances year after year is an affirmation that they satisfy both requirements under NRS 453.166.
18 However, such a conclusion is erroneous given that in 1998, Nevada recognized marijuana as having
19 medical use in treatment under Article 4, Section 38 of the Nevada Constitution.³⁰

20 Because the Board’s misclassification of marijuana, cannabis, and cannabis derivatives in
21 NAC 453.510(4), NAC 453.510(9), and NAC 453.510(10) is in direct contradiction with Article 4,
22 Section 38 of the Nevada Constitution, the misclassification is unconstitutional and must be declared
23 invalid. The clash between Nevada’s explicit recognition of marijuana’s acceptable use in medical
24 treatment, which is enshrined in the Nevada Constitution, and the Board’s classification of

25 ²⁹ NRS 453. 211(1)(a): “The Board shall review the schedule annually and maintain a list of current
26 schedules.”

27 ³⁰ Section 38 not only recognizes that marijuana has accepted medical use in treatment, but it also
28 explicitly lists disorders marijuana must be available to treat.

1 marijuana, cannabis, and cannabis derivatives as Schedule I substances due to the substances having
2 no accepted medical use in treatment presents an important constitutional question. Therefore, the
3 Board exceeded its authority when it placed, or failed to remove marijuana, cannabis, and cannabis
4 derivatives on its list as Schedule I substances and NAC 453.510 (4), NAC 453.510(9), and NAC
5 453.510(10) must be amended to reflect this change.

6 The term “in the United States” as used in NRS 453.166 refers to the geographical confines
7 of the United States, of which Nevada is part. As such, because Nevada law finds that cannabis is
8 acceptable for medical treatment, it cannot be designated a Schedule I substance. Furthermore, the
9 Court finds that it is bound to follow Nevada law, including Article 4, Section 38 of the Nevada
10 Constitution and NRS 453.166, not secondary sources published by federal agencies and medical
11 journals.

12 This Court is not persuaded by Respondents/Defendants argument that Petitioners/Plaintiffs
13 are barred from seeking relief because the regulations at issue have been in force for twenty-two
14 years since the passage of Article 4, Section 38. “Unlawful acts, performed long enough with
15 sufficient vigor, are never enough to amend the law.”³¹

16 To ensure that this Court’s order is effective immediately and that marijuana, cannabis, and
17 cannabis derivatives will no longer be considered Schedule I substances under Nevada law,
18 Petitioners/Plaintiffs urged this Court to order the Board of Pharmacy to comply with NAC 639.110
19 to ensure that Nevada agencies do not consider the regulations active while the Board follows the
20 procedures necessary to amend its list of Schedule I substances. This Court, however, declines to
21 rule on the merits of this argument because as the Board points out, the listing of marijuana,
22 cannabis, and cannabis derivatives in Schedule I no longer has any legal effect with the issuance of
23 this order. *See State v. Eastabrook*, 3 Nev. 173, 180 (1867) (finding that “if a law passed by the
24 legislature be constitutional as to part of its provisions and unconstitutional as to others, the
25 unobjectionable portion may stand, if by rejecting that which is unconstitutional, the whole object
26 and effect of the law is not destroyed.”).

27 ³¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).
28

1 Petitioners/Plaintiffs are entitled to declaratory relief that the Board’s scheduling of cannabis
2 as a Schedule I substance is in direct contradiction with the Nevada Constitution and violates NRS
3 453.166 and writ relief ordering the Board to remove cannabis from its list of Schedule I substances.

4 The remainder of the Complaint, insofar as it pertains to the request for injunctive relief
5 (Petition/Compl. ¶¶ 63 – 66,), is moot as the claims in this matter have been resolved via declaratory
6 relief and the writ of mandamus and is therefore dismissed.

7 **CONCLUSIONS OF LAW REGARDING THE RESERVED RULING**

8 The scope of a Nevadan administrative agency’s authority is limited to the matters that the
9 Nevada State Legislature has expressly or implicitly delegated to the agency, and “an administrative
10 agency cannot enlarge its own jurisdiction.” *City of Reno v. Civil Serv. Comm’n of Reno*, 117 Nev.
11 855, 858 (2001). While an administrative body may make rules and regulations calculated to carry
12 into effect the expressed legislative intention, it may only do so within “prescribed limits and when
13 authorized by the law-making power.” *Cashman Photo Concessions & Labs v. Nev. Gaming*
14 *Comm’n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975). However, regulations that are unauthorized
15 by the law-making power or go beyond the limits prescribed by the Legislature are invalid. *See Id.* If
16 authority to regulate on a particular matter is not explicitly delegated to an agency, the agency must
17 have implicit authority for the action, but “[f]or implied authority to exist, the implicitly authorized
18 act must be essential to carrying out an express duty.” *Stockmeier v. State*, 127 Nev. 243, 248, 255
19 P.3d 209, 212 (2011).

20 Before the Board may designate a substance as a “controlled substance”, the Nevada
21 Legislature must delegate the necessary authority to the Board.³² If the Board designates a substance
22 as a “controlled substance” but the designation falls outside the authority delegated by the
23 Legislature, the designation is invalid.³³

24 While the Legislature may have delegated the general authority to regulate marijuana,
25 cannabis, and cannabis derivatives pursuant to the Board in 1981, the Board no longer has the

26 ³² *See Miller v. Jacobson*, 104 Nev. 600, 763 P.2d 356, 358-359 (1988) (holding State could not
27 prosecute a defendant for possessing a substance that was improperly scheduled by the Board as a
28 controlled substance).

³³ *Id.*

1 authority to regulate those substances because they are now regulated pursuant to NRS Title 56
2 “Regulation of Cannabis”.

3 As the Board of Pharmacy acknowledges, Title 56, stretching across four chapters of the
4 Nevada Revised Statutes,³⁴ provides a comprehensive regulatory regime for cannabis used
5 recreationally and medically. Every aspect of cannabis production, transportation, distribution, sale,
6 and use is governed by the provisions in Title 56.

7 Relevant to this matter, Title 56 explicitly describes what Nevada executive agencies are
8 involved in this regulatory regime and the extent of their regulatory authority. Under Title 56:

- 9 • The Cannabis Compliance Board is *explicitly* authorized to “adopt regulations
10 necessary or convenient to carry out the provisions of [Title 56].”³⁵ NRS 678A.450(1).
11 This authority includes the regulation of “medical cannabis dispensaries” as defined by
NRS 678A.175 and the “medical use of cannabis” as defined by NRS 678A.215.
- 12 • The Cannabis Advisory Commission is *explicitly* authorized to make
13 “recommendations to the Cannabis Compliance Board regarding the regulation of,
14 cannabis and any activity related to the cannabis” and *explicitly* placing the Directors
of the Departments of Public Safety and Taxation on the Commission. NRS
15 678A.300(1).
- 16 • The Nevada Division of Public and Behavioral Health is *explicitly* authorized to
17 promulgate regulations related to “the issuance of registry identification cards and
18 letters of approval to persons” eligible for medical cannabis under Nevada law. NRS
19 678B.640.
- 20 • The Nevada Department of Taxation is *explicitly* authorized to conduct tax audits on
21 licensees under Title 56 and to determine the fair market value of wholesale cannabis.
22 NRS 678A.480; NRS 678B.640; and
- Local governments are *explicitly* authorized to adopt and enforce local cannabis control
measures pertaining to zoning and land use for adult-use cannabis establishments. NRS
678D.510(1)(d).

23 In the single instance a provision outside of NRS Title 56 authorizes a State agency to regulate an
24 aspect of the cannabis market (NRS 586.550(2) authorizes the Department of Agriculture to
25 promulgate regulations regarding what pesticides may be used on cannabis or cannabis products),
26

27 ³⁴ NRS Chapters 678A–D.

28 ³⁵ The breadth and scope of the NRS Title 56 is in its title: “Regulation of Cannabis”.

1 the provision provides explicit authorization similar to its counterparts in NRS Title 56. In contrast,
2 the Board of Pharmacy has not received similar explicit authorization to regulate *any* aspect of the
3 cannabis market, let alone in a manner that would subject Nevadans to significant criminal penalties
4 for sale or possession of cannabis. In fact, the Board of Pharmacy is not referenced once in the four
5 chapters that comprise Title 56.

6 Considering the Board of Pharmacy’s primary role is to regulate pharmacies and substances
7 distributed from those institutions, the Board’s absence from Title 56 is unsurprising as the
8 substances governed by that Title may only be distributed through dispensaries licensed by the
9 Cannabis Compliance Board, not pharmacies.³⁶ This restriction applies to both medical and
10 recreational cannabis.³⁷ This means that even if the Board of Pharmacy designated cannabis as a
11 substance that a pharmacy could theoretically distribute pursuant to the Board’s regulations,
12 pharmacies would still be barred from doing so pursuant to Title 56. Furthermore, presumably
13 cannabis distributed through pharmacies would be limited to medical use, but the Board itself has
14 acknowledged that it “has no jurisdiction over the medical use of marijuana.”³⁸

15 The Board of Pharmacy’s argument that the Nevada Legislature was required to explicitly
16 inform the Board that it was not included in cannabis’s current regulatory regime is unconvincing.
17 This position inverts the relationship between the Legislative and Executive branches of
18 government. The manner in which Nevada law regulated cannabis underwent a paradigm shift with
19 the passage of the *Initiative*, the enactment of Title 56, and the creation of the Cannabis Compliance
20 Board to coordinate the cannabis market, and the explicit delegation of cannabis regulation to
21 existing agencies that were not the Board. Every aspect of the cannabis market was accounted for

22 ³⁶ NRS 678A.450(1) (authorizing the Cannabis Compliance Board to regulate the dispensation of
23 both medical and recreational cannabis); NRS 678B.210(1) (requiring any person engaging in the
24 business of a medical cannabis establishment to hold a medical cannabis establishment license
25 issued by the Cannabis Compliance Board); NRS 678B.250(1) (requiring any person engaging in the
26 business of an adult-use cannabis establishment to hold an adult-use cannabis establishment license
27 issued by the Cannabis Compliance Board)

28 ³⁷ *Id.*

³⁸ Nevada State Board of Pharmacy, *Practice Frequently Asked Questions*,
https://bop.nv.gov/resources/FAQ/Practice_FAQ/ (August 17, 2022).

1 under the new regime without the Board’s inclusion. Under such circumstances, it is on the Board,
2 not the Legislature, to explain how it still has the authority to regulate the subject matter governed
3 by NRS Title 56, and it has failed to do so.

4 The Board’s claim that its authority to list marijuana, cannabis, and cannabis derivatives as
5 controlled substances in Schedule II, III, IV, or V does not conflict with Title 56 is also
6 unconvincing. The Board’s authority to regulate marijuana, cannabis, and cannabis derivatives under
7 NRS Chapter 453 is inconsistent with Title 56 as explained above. And as the Board itself admits,
8 Section 214 of AB 533 amended NRS 453.005 to read: “[t]he provisions of this chapter do not apply
9 to the extent that they are inconsistent with the provisions of title 56 of NRS.” The fact that NRS
10 Chapter 453 governs the unlawful possession, trafficking or production of marijuana does not
11 support a finding that the Board, therefore, still has the authority to regulate marijuana. It is
12 important to reiterate that Title 56 created a comprehensive regulatory scheme that excluded the
13 Pharmacy Board entirely.

14 Furthermore, the Nevada Supreme Court, on multiple occasions, has clarified that a
15 subsequent statute may repeal a prior statute by implication when the subsequent statute expresses a
16 comprehensive plan to regulate the particular subject matter in question. *See Washington v. State*,
17 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (holding that “if a subsequent statute expresses a
18 comprehensive plan to regulate a particular subject matter, this may repeal prior statutes that deal
19 with smaller aspects of that plan”) (citations omitted)). The regulatory framework created by Title
20 56 is not only comprehensive, but it also fails to empower the Board of Pharmacy with any explicit
21 authority to regulate any aspect of marijuana. Notably, the regulatory framework expressly
22 authorizes numerous other government boards with the power to regulate marijuana, but not the
23 Board of Pharmacy.

24 This order is limited to substances governed by Title 56. It does not apply to substances that
25 are not regulated pursuant to the regime prescribed by Title 56 and so may still be distributed
26 through pharmacies as the regulation of such substances still fall within the authority delegated to
27 the Board of Pharmacy by the Nevada Legislature.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Cannabis, as defined by NRS 678A.085, has accepted medical use in treatment as set forth in the Constitution of the State of Nevada, Article 4, Section 38, titled “Use of plant of genus Cannabis for medical purposes”;

2. The accepted medical use of cannabis enshrined in the Constitution of the State of Nevada, Article 4, Section 38 precludes cannabis from regulation as a Schedule I substance pursuant to the definition of a Schedule I substance set forth in NRS 453.166;

3. The scheduling of cannabis as a Schedule I substance is in direct conflict with Article 4, Section 38 of the Constitution of the State of Nevada and violates NRS 453.166;

4. Any and all provisions under NAC 453.510 scheduling cannabis as a Schedule I substance, specifically NAC 453.510(4) where cannabis is listed as “Marijuana;” NAC 453.510(9) which references “tetrahydrocannabinols;” and NAC 453.510(10) which discusses “CBD;” as well as any and all other references to marijuana, cannabis, and cannabis derivatives, are invalid pursuant to Article 4, Section 38 of the Constitution of the State of Nevada;

5. The Legislature’s directive as set forth in NRS 453.211(1)(a) that, “The Board shall review the schedules annually and maintain a list of current schedules,” requires the Nevada Board of Pharmacy to update the schedule of controlled substances to comply with the Nevada Constitution and conform with the statutory definitions of each schedule;

6. The Nevada Board of Pharmacy acted outside of its authority when it failed to remove cannabis from the list of Schedule I substances upon the enactment of Article 4, Section 38 of the Constitution of the State of Nevada, which recognizes the use of cannabis for medical treatment;

7. The Nevada Board of Pharmacy is hereby ordered to remove cannabis from the list of Schedule I substances, specifically from NAC 453.510(4) where it is listed as “Marijuana”, NAC

1 453.510(9) which references “tetrahydrocannabinols”, and NAC 453.510(10) which discusses
2 “CBD”, as well as any and all other references to marijuana, cannabis, and cannabis derivatives;³⁹

3 8. The listing of marijuana, cannabis, and cannabis derivatives in Schedule I under NAC
4 453.510 no longer has any legal effect;

5 9. The Nevada Board of Pharmacy is hereby ordered to cease the regulation of
6 substances subject to regulation pursuant to Title 56; and

7 10. If any substances regulated pursuant to Title 56 are currently scheduled as a
8 controlled substance, the Board must remove such substance from the agency’s schedule of
9 controlled substances.

10 Petitioners’ Petition for Writ of Mandamus and Request for Declaratory Relief is
11 **GRANTED.**

12 Dated this 26th day of October, 2022

13 
14 _____

15 **FF8 A68 E46D 92DE**
16 **Joe Hardy**
17 **District Court Judge**

18
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23
24
25
26 _____
27 ³⁹ NAC 639.110 “When any regulation adopted by the Board and filed with the Secretary of State
28 expires by its own terms, is repealed or is declared unconstitutional by a court of competent
jurisdiction, the Executive Secretary shall so inform the Secretary of State and request that it be
placed in an inactive file.”

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Cannabis Equity and Inclusion
7 Community, Plaintiff(s)

CASE NO: A-22-851232-W

8 vs.

DEPT. NO. Department 15

9 Nevada ex reL. Board of
10 Pharmacy, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 10/26/2022

16 Ashley Balducci

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17 Luke Rath

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22 Christopher Peterson

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