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DISTRICT COURT
CLARK COUNTY, NEVADA

SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company, TGIG, LLC, a Nevada limited liability company, NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company, NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company, TRYKE COMPANIES SO NV, LLC, a Nevada limited liability company, TRYKE COMPANIES RENO, LLC, a Nevada limited liability company, PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company, GBS NEVADA PARTNERS, LLC, a Nevada limited liability company, FIDELIS HOLDINGS, LLC, a Nevada limited liability company, GRAVITAS NEVADA, LLC, a Nevada limited liability company, NEVADA PURE, LLC, a Nevada limited liability company, MEDIFARM, LLC, a Nevada limited liability company, DOE PLAINTIFFS I through X; and ROE ENTITY PLAINTIFFS I through X,

Plaintiffs,

vs.

THE STATE OF NEVADA, DEPARTMENT OF TAXATION,

Defendant.

CASE NO.: A-19-786962-B
DEPT. NO.: 11

HEARING REQUESTED

MOTION FOR PRELIMINARY INJUNCTION

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COME NOW the Plaintiffs, SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company, TGIG, LLC, a Nevada limited liability company, NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company, NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company, TRYKE COMPANIES SO NV, LLC a Nevada limited liability company, TRYKE COMPANIES RENO, LLC, a Nevada limited liability company, PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company, GBS NEVADA PARTNERS, LLC, a Nevada limited liability company, FIDELIS HOLDINGS, LLC, a Nevada limited liability company, GRAVITAS NEVADA, LLC, a Nevada limited liability company, NEVADA PURE, LLC, a Nevada limited liability company, MEDIFARM, LLC, a Nevada limited liability company; DOE PLAINTIFFS I through X; and ROE ENTITIES I through X, by and through their counsel, DOMINIC P. GENTILE, ESQ., VINCENT SAVARESE III, ESQ., MICHAEL V. CRISTALLI, ESQ., and ROSS MILLER, ESQ., of the law firm of Gentile Cristalli Miller Armeni Savarese, and pursuant to the Fourteenth Amendment to the Constitution of the United States; Article 1, Sections 1 and 8 of the Constitution of the State of Nevada; Title 42, United States Code ("U.S.C."), Section 1983; 2016 Initiative Petition, Ballot Question No. 2 entitled the "Regulation and Taxation of Marijuana Act" (the "Ballot Initiative"); Nevada Revised Statutes ("NRS"), Chapter 453D ("the enabling statutes"); Nevada Administrative Code ("NAC"), Chapter 453D ("the Regulation"); Section 80 of the Adopted Regulation of the Department of Taxation, LCB File No. R092-17 ("R092-17"); NRS 33.010, and other laws and regulations of the State of Nevada, hereby respectfully request that this Honorable Court enter a preliminary injunction providing them with the following relief pending a trial on the merits and a final judgment in this matter, as requested in the Complaint on file herein:

A. An order enjoining the enforcement of the denial by the State of Nevada Department of Taxation ("the Department") of Plaintiffs' applications for conditional licenses to operate adult-use recreational marijuana retail stores;

B. An order enjoining the enforcement of the conditional licenses to operate such recreational marijuana retail stores granted by the Department to other applicants;

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C. An order enjoining the enforcement and implementation of the current regulation governing the adult-use recreational marijuana retail store conditional licensing application and determination process adopted by the Department codified at Nevada Administrative Code ("NAC") Chapter 453D ("the Regulation") pursuant to which Plaintiffs' applications for conditional licensure were denied and the applications of other applicants for conditional licensure were granted by the Department;

D. An order restoring the *status quo ante* prior to the Department's adoption of the Regulation;

E. An order compelling the Department to disclose all applications and scoring information pertaining to each and every applicant for conditional licensure;

F. An order compelling the Department to disclose the identities, training, and qualifications of each and every scorer of the various applications;

G. An order compelling the Department to disclose the policies, procedures, guidelines, and/or regulations which governed the manner by which the various scorers assessed numerical points to each criterion applied in the license application determination process, whether published or unpublished, and the manner by which uniformity and consistency of scoring assessment was ensured.

THIS MOTION is made and based upon all pleadings and papers on file in this action, the exhibits appended hereto, the following Memorandum of Points and Authorities and such evidence and argument as the Court may require at time of hearing.

IN SUPPORT OF THIS MOTION Plaintiffs respectfully assign the following grounds:

1. The provisions of the Regulation and the licensing determinations of the Department exceed the parameters of the delimited regulatory authority delegated to the Department by the Ballot Initiative and its codification by the Nevada Legislature at NRS Chapter 453D, in that:

   A. NAC 453D.272(3) textually permits the Department to rank applications and allocate conditional licenses according to the proportionate populations of specific

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municipal jurisdictions and unincorporated areas within a county, rather than on a county-wide basis as textually required by NRS 453D.210;

B. NAC 453D.272(1) textually permits the Department to rank applications and allocate conditional licenses based upon arbitrary, irrelevant, vague, ambiguous, undisclosed, and unpublished criteria, rather than criteria "that are directly and demonstrably related to the operation of a marijuana establishment," as textually required by NRS 453D.200(1)(b) and rather than pursuant to "an impartial and numerically scored competitive bidding process" as textually required by NRS 453D.200(2) and NRS 453D.210(6);

C. The Regulation does not assign specific numerical point values, or numerical point value ranges, applicable to any of the licensing criteria that are listed in NAC 453D.272(1) and certainly cannot do so with respect to the undisclosed and unpublished, additional criteria referred to therein only as "additional criteria," and does not require that all such criteria be equally weighted, uniformly and consistently assessed, or scored by adequately trained and qualified personnel, all of which is further inconsistent with the "impartial and numerically scored competitive bidding process" textually required by NRS 453D.200(2) and NRS 453D.210(6);

D. The Department has failed to issue the number of conditional licenses required by NRS 453D.210(5):

E. The Department has engaged in unlawful *ad hoc* rule-making by arbitrarily limiting each applicant to a single conditional license per locality absent legislative authorization by NRS Chapter 453D:

F. On information and belief, the Department has failed to conduct the background check required by NRS 453D.200(6) in order to determine that "each prospective owner" has not been convicted of certain felony offenses and has not served as an owner of a marijuana establishment that has had its license revoked, particularly with respect public-company applicants, as textually required by NRS

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453D.210(5)(f) and NAC 453D.312(1), which requires the Department to deny any application that is not in compliance with any provision of NRS Chapter 453D;

G. The Department has failed to send written notices of rejection to un-approved applicants adequately setting forth the reasons why it did not grant their conditional license applications as textually required by NRS 453D.210(4)(b);

H. The Department has arbitrarily and capriciously refused to permit un-approved applicants to review the scoring for their conditional license application until after the time to appeal the licensing determination has expired (pursuant to NRS 233B.130); will not provide them with any explanation as to how their score for each published criterion was determined; will not advise them whether undisclosed, unpublished "additional criteria" were considered in rejecting their applications, and if so, provide them with any explanation as to how their score for each such criterion was determined; and will not provide them with copies of the scoring for their own applications or the applications of any other applicants who were either granted or denied licenses; and therefore, the Department has effectively deprived Plaintiffs of information necessary to determine whether the Department accurately scored their applications; meaningfully exercise their right to appeal the Department's licensing determinations; or meaningfully obtain informed and appropriate judicial review of the Department's administrative decisions; and

I. The Department has arbitrarily and capriciously allocated and issued conditional licenses in violation of its own (albeit otherwise invalid) Regulation.

2. The provisions of the Regulation are facially repugnant to the above-cited federal and state constitutional provisions, in that:

A. For the foregoing reasons, they textually permit the arbitrary and capricious deprivation of a qualified and prevailing, properly-ranked applicant's property interest in conditional licensure, in derogation of such an applicant's statutory

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entitlement thereto under the provisions of NRS 453D.200 and NRS 453D.210, and therefore in violation of the due process protections guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada;

B. For the foregoing reasons, they likewise textually permit the arbitrary and capricious deprivation of such an applicant's liberty interest in conditional licensure, in derogation of such an applicant's statutory entitlement thereto under the provisions of NRS 453D.200 and NRS 453D.210, and therefore in violation of the due process protections guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada and the fundamental federal constitutional right to pursue a lawful occupation; and

C. For the foregoing reasons, they further likewise textually permit the arbitrary and capricious deprivation of such an applicant's aforesaid property and liberty interests in conditional licensure in violation of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada.

3. On information and belief, the denial of Plaintiffs' applications for conditional licensure by the Department was in fact affected by actual arbitrary and capricious decision-making in derogation of the provisions of NRS 453D; and therefore, the licensing process was also thereby rendered unconstitutional in its application as to Plaintiffs for the reasons set forth *supra*.

4. The Department's improper denial of conditional licensure to Plaintiffs in violation of the above-cited constitutional and statutory provisions has unreasonably interfered with Plaintiffs' business interests and has thereby caused and continues to cause irreparable harm to Plaintiffs for which Plaintiffs have no adequate remedy at law;

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5. The Department will suffer no harm by following the requirements of the above-cited constitutional and statutory provisions in properly administering the regulation of the conditional licensing process;
6. The public interest is consistent with Plaintiffs' interests in the proper administration of a transparent, impartial and objective licensing process in accordance with the above-cited constitutional and statutory provisions; and
7. For the foregoing reasons, Plaintiffs are likely to succeed on the merits in this litigation.

Dated this 18 day of March, 2019.

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NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above foregoing motion on for Hearing before this Court on the ____ day of _____, 2019, at the hour of _____ a.m./p.m. of said day, or as soon thereafter as counsel can be heard in Department 11.

Dated this 18 day of March, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

In 2017, after the voters of the State of Nevada embraced the sale of marijuana to adults for recreational use, the Nevada Department of Taxation was tasked by the Legislature with implementing a new licensing application process for the sales of recreational marijuana in this state.

By 2018, it had become clear that the application scheme and grading process that the Department had established completely lacked transparency for stakeholders across the board. The taxpaying public, license-holding members of the Nevada cannabis industry and their employees who pioneered the sale of medical marijuana, regulators at the county and municipal

level, and members of the media were completely unable to audit what was going on and ensure the accountability of those involved in the licensing process. The public concern regarding the possibility of the presence of organized criminal cartels (that previously had absolute control over the cultivation and distribution of marijuana) in this new taxed and regulated industry was unable to be addressed. The Department of Taxation – refusing to reveal the information necessary to audit the process under the guise of "privacy concerns" – has cavalierly taken the position of: "just trust us."

This has resulted in the recreational marijuana retail store licensing application process adopted and administered by the Department being inconsistent with the enabling statutes enacted by the Nevada Legislature and unconstitutional, both on its face in that it permits the arbitrary and capricious deprivation of an applicant's due process, property and liberty interests, and as applied with regard to the denial of conditional licensing that resulted. The Department's closed-door approach to licensing determinations in one of Nevada's most lucrative emerging industries which, until now, has been completely controlled by lawless and violent elements, runs counter to Nevada's longstanding tradition of transparency in the licensing of liquor and gaming establishments. Nevada's history of dealing with such licensing in the light of day has long established the Silver State's approach as the "gold standard" for entitlement processes.

Conversely, it is precisely this type of "closed system" which the Department implemented in 2018 that is ripe for the potential of corruption of both the application system and officials involved in the entitlement process. This lack of transparency is of even graver concern given the fact that the market has established that cannabis licenses are worth tens of millions, even hundreds of millions, of dollars. Given the Department's lack of transparency in the 2018 application scheme, the system is therefore ripe for corruption on all levels.

Among the most troubling outcomes of the 2018 licensing scheme was the fact that some Nevada residents who were owners of recreational sales and cultivation licenses with essentially perfect records of operation were completely shut out. They were granted no new licenses. At the same time, non-Nevada residents and foreign nationals were awarded a significant number of licenses. This occurred despite the fact these non-residents and foreign nationals had absolutely

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no record of operation in Nevada's cannabis industry. Worse still, they acquired their interests in the applying entities by purchasing shares in publicly-traded companies with anonymous stockholders, *after* the applications were filed by their original owners.

Among the issues which make Plaintiff's claims likely to prevail at trial is that it is widely understood that even though these licenses are worth millions of dollars, the decision-making process by the Nevada Department of Taxation was conducted by temporary workers contracted on a daily basis by "Manpower," whose training, consistency and supervision are unascertainable, and who were not susceptible to the accountability of regular government employees. Despite this troubling lack of judgment, experience, and accountability, the Department's position is that there is no right of appeal from the denial of a license application, and no right of redress in the administrative process. This arbitrary and capricious approach to a "final verdict" in administrative licensing is in direct contravention of the due process protections of the Fourteenth Amendment to the United States Constitution.

Finally, Plaintiffs allege, on information and belief, that as a result of the Department's refusal to allow daylight to enter the machinations of the process so as to permit effective scrutiny by the public and others with direct interest in it, the denial of their applications for licensure by the Department has in fact been affected by actual arbitrary, capricious or corrupt decision-making based upon administrative partiality or favoritism. And as a result, the licensing process was thereby rendered unconstitutional in its application as to Plaintiffs.

2.

STATEMENT OF FACTS

The Nevada Legislature passed a number of bills during the 2017 legislative session concerning the licensing, regulation, and operation of recreational marijuana establishments in the State of Nevada. One of those bills, Assembly Bill 422, transferred responsibility for the registration, licensing, and regulation of marijuana establishments from the State of Nevada Division of Public and Behavioral Health to the State of Nevada Department of Taxation ("the Department"). This legislation was approved by the voters at the General Election of 2016 as Initiative Petition, Ballot Question No. 2, entitled the "Regulation and Taxation of Marijuana

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Act," ("the Ballot Initiative"), appended hereto and incorporated herein by reference as "Exhibit A." It was enacted by the Nevada Legislature; and is codified at NRS Chapter 453D.

NRS 453D.200 provides, in pertinent part:

> "1. Not later than January 1, 2018, the Department ***shall*** adopt all regulations necessary or convenient ***to carry out the provisions of this chapter***. The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable. The regulations ***shall*** include:
>
> (a) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment;
>
> (b) Qualifications for licensure ***that are directly and demonstrably related to the operation of a marijuana establishment***;
>
> 2. The Department ***shall approve or deny*** applications for licenses ***pursuant to NRS 453D.210***."

(Emphasis added.)

NRS 453D.210, *in turn*, provides, in pertinent part:

> "4. Upon receipt of a complete marijuana establishment license application, the Department ***shall***, within 90 days:
>
> (a) ***Issue the appropriate license if the license application is approved***.
>
> 5. The Department ***shall approve*** a license application if:
>
> (a) The prospective marijuana establishment has ***submitted an application in compliance with regulations adopted by the Department and the application fee required pursuant to NRS 453D.2***;
>
> 6. When ***competing applications*** are submitted for a proposed retail marijuana store ***within a single county***, the Department ***shall*** use an ***impartial and numerically scored competitive bidding process*** to determine which application or applications among those competing will be approved."

(Emphasis added.)

And NRS 453D.210 requires the Department to rank applications and allocate conditional licenses according to proportionate *county-wide* populations.

The Department thereupon adopted a regulation governing the adult-use recreational marijuana retail store conditional licensing application and determination process, which is codified at NAC Chapter 453D ("the Regulation").

Rather than criteria "that are ***directly and demonstrably related to the operation of a marijuana establishment***," as textually required by NRS 453D.200(1)(b) as set forth *supra*,

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NAC 453D.272(1) textually purports to permit the Department to rank applications and allocate conditional licenses based upon all of the following enumerated criteria:

a. Operating experience of ***another kind of business*** by the owners, officers or board members that has given them experience which is applicable to the operation of a marijuana establishment;

b. ***Diversity*** of the owners, officers or board members;

c. Evidence of ***the amount of taxes paid*** and ***other beneficial financial contributions***;

d. ***Educational achievements*** of the owners, officers or board members;

e. The applicant's plan for care, quality and safekeeping of marijuana from seed to sale;

f. The financial plan and ***resources of the applicant, both liquid and illiquid***;

g. The experience of key personnel that the applicant intends to employ; and

h. Direct experience of the owners, officers, or board members of a medical marijuana establishment or marijuana establishment in this state.

(Emphasis added.)

Moreover, NAC 453D.272(1)(i) further purports to allows the Department to rank applications based on "***[a]ny other [undisclosed and unpublished, additional] criteria that the Department determines to be relevant***" (emphasis added). And consistent therewith, Section 6.3 of the conditional licensing application form created by the Department, (appended hereto and incorporated herein by reference as "Exhibit B"), states that "[a]pplications that have not demonstrated a sufficient response related to the [specifically enumerated] criteria set forth above will not have ***additional [undisclosed, unpublished] criteria*** considered in determining whether to issue a license ***and will not move forward in the application process***" (emphasis added). Thus, conversely, by necessary implication, in order for it to "***move forward in the application process***," that section of the application form textually subjects an application which *has* in fact demonstrated a *sufficient* response related to the specifically enumerated, published criteria set forth above to "***additional [unspecified, unknown, and unpublished] criteria***"—

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consideration of which by the Department will determine whether or not a license application will ultimately be approved—notwithstanding the textual requirement of NRS 453 D. 200.1(b) that the Department "***shall***" adopt regulations that prescribe only "[q]ualifications for licensure that are ***directly and demonstrably related to the operation of a marijuana establishment***" (emphasis added).

Furthermore, rather than pursuant to "an ***impartial*** and ***numerically scored*** competitive bidding process" as textually required by NRS 453D.200(2) and NRS 453D.210(6), by purporting to allow the Department to rank applications based on "***[a]ny other [undisclosed, unknown and unpublished, additional] criteria that the Department determines to be relevant,***" NAC 453D.272(1)(i) textually permits the Department to undertake *unbridled discretion* to rank applications based on criteria that are arbitrary and unknown to the applicants and the public—not only in the absence of legislative delegation of authority, but clearly in derogation of expressed legislative intent to specifically delimit and cabin administrative discretion in licensing determinations. And, due to the absence of transparency thereby enshrined, there is no accounting for the potential of partiality, favoritism, or even outright corruption in the decision-making process (emphasis added).

Nor does the Regulation assign specific numerical point values, or numerical point value ranges, applicable to any of the licensing criteria that are listed in NAC 453D.272(1), and certainly cannot do so with respect to the undisclosed and unpublished, additional criteria referred to therein. Neither does it require that all such criteria be equally weighted, uniformly and consistently assessed, or scored by adequately trained and qualified personnel.

NAC 453D.272(3) further textually permits the Department to allocate conditional licenses according to the proportionate populations of specific municipal jurisdictions and unincorporated areas *within* a county, rather than on a *county-wide* basis as required by NRS 453D.210. Indeed, NRS 453D.210(5)(d) sets presumptive caps on the number of licenses issued in each county, according to *county-wide* population. And NRS 453D.210(5)(d)(5) permits the Department to issue *more* licenses, but only if the *county* requests that it do so.

. . .

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Pursuant to NRS 453D.210(5)(d)(1), the cap in Clark County is 80 licenses. However, the Department issued only 78 licenses in Clark County.

And, absent statutory authority to do so, the Department's application form states that "[n]o applicant may be awarded more than 1 (one) retail store license in a jurisdiction/locality, unless there are less applicants than licenses allowed in the jurisdiction." Exhibit A at page 8.

On Information and belief, the Department has failed to conduct the background check required by NRS 453D.200(6) in order to determine that "***each*** prospective owner," (emphasis added), has not been convicted of certain felony offenses and has not served as an owner of a marijuana establishment that has had its license revoked, particularly with respect to shareowners of public companies, as required by NRS 453D.210(5)(f) and NAC 453D.312(1)—which requires the Department to deny any application that is not in compliance with any provision of NRS Chapter 453D.

The Department has further failed to send written notices of rejection to un-approved applicants adequately setting forth the specific reasons why it did not grant their conditional license applications as required by NRS 453D.210(4)(b). Rather, the notices of rejection merely state, in every case, that the applicant did not attain a high enough score.

The Department will not permit un-approved applicants to review the scoring for their conditional license application until after the time to appeal the licensing determination has expired (pursuant to NRS 233B.130); will not provide them with any explanation as to how their score for each published criterion was determined; will not advise them whether or not undisclosed, unpublished criteria were considered in rejecting their applications, and if so, provide them with any explanation as to how their score for each such unpublished and undisclosed criterion was determined; and will not provide them with copies of the scoring for their own applications or any information regarding the applications of any other applicants who were either granted or denied licenses; and will not discuss the scoring provided or the application review process; and therefore, the Department has effectively deprived Plaintiffs with information necessary to determine whether the Department accurately scored their applications; appeal the Department's licensing determinations; or obtain informed and appropriate judicial

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review of the Department's administrative decisions. *See* Marijuana Establishment (ME) Application Score Review Meeting Procedures, appended hereto and incorporated herein by reference as "Exhibit C."

Plaintiffs were among those applicants which sought licenses to own and operate recreational marijuana retail stores pursuant to the Regulation, having submitted their applications in compliance with the requirements thereof together with the required application fee in accordance with NRS 453D.210.

However, Plaintiffs have all been informed by the Department that each of their Applications were denied. And in each instance, Plaintiffs were simply informed by letter from the Department that a license was not granted to the Plaintiff applicant "because it did not achieve a score high enough to receive an available license."

On information and belief, Plaintiffs allege that the Department improperly denied their license applications and, conversely, improperly granted licenses to other competing applicants, absent implementation of the impartial and objective competitive bidding process mandated by NRS 453D.210, and based upon the assumption of arbitrary and capricious exercise of impermissibly unbridled administrative discretion.

And on information and belief, Plaintiffs allege that the Department has further violated its own Regulation by granting more than one recreational marijuana store license per local jurisdiction to certain applicants, owners, or ownership groups.

3.

LEGAL STANDARD

NRS 33.010 (Cases in which injunction may be granted) provides:

"An injunction may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.

3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in

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violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual."

NRS 30.040.1 (Questions of construction or validity of instruments, contracts and statutes) provides:

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

And 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ***suit in equity***, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

(Emphasis added.)

Thus, as the Nevada Supreme Court has explained, under NRS 33.010: "A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy." *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). *See also e.g., City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013); *University Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *Dangberg Holdings Nevada, L.L.C. v. Douglas Cty. & its Bd. of Cty. Comm'rs*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999).

"The decision whether to grant a preliminary injunction is within the sound discretion of the district court, whose decision will not be disturbed on appeal absent an abuse of discretion."

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Dangberg Holdings, 115 Nev. at 142–43, 978 P.2d at 319 (1999). *See also e.g., State, Dep't of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. 362, 366, 294 P.3d 1223, 1226 (2012). However, our Supreme Court has pointed out that "when [as in this case] the underlying issues in the motion for preliminary injunction involve[ ] questions of statutory construction, including the meaning and scope of a statute, we review . . . those questions [of law] de novo." *Id. See also e,g., City of Sparks*, 129 Nev. at 357, 302 P.3d at1124–25 (2013) ("Whether to grant or deny a preliminary injunction is within the district court's discretion. *Nevadans for Sound Gov't,* 120 Nev. at 721, 100 P.3d at 187. In the context of an appeal from a preliminary injunction, we review questions of law de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support").

4.

ARGUMENT

I.

THE PROVISIONS OF THE REGULATION TEXTUALLY EXCEED THE PARAMETERS OF THE DELIMITED REGULATORY AUTHORITY DELEGATED TO THE DEPARTMENT BY THE BALLOT INITIATIVE AND ITS CODIFICATION BY THE NEVADA LEGISLATURE PURSUANT TO NRS CHAPTER 453D.

Because administrative regulations have the force of law and are legislative in nature, an administrative agency must be given statutory authority to adopt regulations. *Cty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 912, 315 P.3d 294, 296 (2013). Thus, an administrative agency cannot enact regulations that exceed the rule-making authority delegated to it by enabling statute. *Village League to Save Incline Assets, Inc. v. State*, 388 P.3d 218, 225 (Nev. 2017). And therefore, courts "will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

The process the Department has used to grant or deny the new licenses for retail marijuana stores was illegal and the Department's licensing determinations must therefore be set aside. Thus, as discussed *infra*, the Department violated the requirements of the Ballot Initiative

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and NRS Chapter 453D in numerous respects, including: by ranking and allocating licenses according to the populations of specific localities within a county; by ranking and allocating applications using arbitrary, irrelevant, undisclosed and unpublished criteria; by failing to issue the required number of licenses; and by limiting the number of licenses to one per applicant for each local jurisdiction.

A.

The Regulation Violates NRS 453D.210 By Ranking Applications And Allocating Licenses According To Local Municipalities And Unincorporated Areas Within A County Rather Than On A County-Wide Basis.

NAC 453D.272(1) states that the Department will allocate licenses and rank applications according to the proportionate populations of various local jurisdictions *within* a single county. This process directly conflicts with NRS 453D.210, which requires the Department to rank and issue licenses on a *county-wide* basis.

NAC 453D.272 is invalid because it exceeds the Department's rule-making authority and directly conflicts with NRS 453D.210. Thus, NAC 453D.272(3) provides in relevant part:

> "The Department will allocate the licenses for retail marijuana stores described in paragraph (d) of subsection 5 of NRS 453D.210 to jurisdictions ***within*** each county and to the unincorporated area of the county proportionally ***based on the population of each [such] jurisdiction and of the unincorporated area of the county***."

(Emphasis added.)

That subsection further states:

> "***Within each such jurisdiction or area***, the Department will issue licenses for retail marijuana stores to the highest-ranked applicants until the Department has issued the number of licenses authorized for issuance."

(Emphasis added.)

Nothing in NRS Chapter 453D authorizes the Department to rank applications or allocate licenses to certain local jurisdictions *within* a county. Rather, the Initiative and NRS Chapter 453D clearly delimit the Department's authority to issue licenses according to *county* only. Thus, the Department does not have the authority to pick and choose the jurisdictions *within* a county where licenses will be issued, or to decide how many it will issue on that basis.

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Indeed, NRS 453D.210(6) provides: "When competing applications are submitted for a proposed retail marijuana store ***within a single county***, the Department ***shall*** use an impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved" (emphasis added).

Thus, the Ballot Initiative and enabling statutes already make provision for situations in which there are multiple "competing applications" for licenses in a single county. The statute's reference to "competing applications … ***within a single county***" plainly shows that it is *all* the applications *within a county* (not an intra-county local jurisdiction) that are "competing." The statute further mandates that the Department "***shall***" use a competitive bidding process to determine which applications "among those competing" will be approved. Thus the phrase "among those competing" must be construed to refer to those "applications for licenses ***in a single county***." And therefore, the statute must be construed to require the competitive bidding process to apply on a *county-wide* basis.

NRS 453D.210(6) is *mandatory*, and therefore *requires* the Department to rank all competing applications within the county as a whole, and to issue licenses according to applicants' rankings on that basis, and does not permit the Department to rank applications or allocate licenses according to the population of specific localities *within* a county. NAC 453D.272 directly conflicts with this mandate by purporting to authorize the Department to rank and allocate licenses on a completely different basis, *i.e.*, population of certain localities. Ans accordingly, NAC 453D.272 is invalid because it conflicts with NRS 453D.210(6).

Furthermore, NAC 453D.272 violates the plain purpose and intent of NRS 453D.210(6) to require that where there are more applicants than there are licenses to be issued within a county, the Department should determine which are the "best" applicants, and issue licenses to those applicants first. Whereas by contrast, the Department's method, as set forth in NAC 453D.272, could result in licenses being issued to lower-ranked applicants on the fortuitous basis of where the applicant's proposed store happens to be located *within* the county. Thus, because the Department's method violates NRS 453D.210(6), an applicant who would otherwise rank quite poorly as compared to all other applicants in the county could achieve a higher ranking in a

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specific local jurisdiction within the county due to less competition, and thus be awarded a license ahead of more qualified applicants within the county who did not apply for a license in *all* of the local jurisdictions within it in order to meet the Department's self-imposed local population allocation.

Other provisions of the Ballot Initiative and NRS Chapter 453D also demonstrate that the Department has no authority to pick and choose the specific localities within a county where it will issue licenses, and how many it will issue.

First, NRS 453D.210(5)(d)(5) provides that the Department may issue *more* licenses than set forth in the statute, but only "[u]pon request of a ***county*** government" (emphasis added), whereas, in contradistinction, local governments are not permitted to make such requests.

And second, NRS 453D.210(5) mandates that the Department "***shall***" issue licenses to applicants who meet the requirements of the statute and regulations, unless certain exceptions apply. The only relevant exception in this case is set forth in NRS 453D.210(5)(e), which provides that, assuming other conditions are met, the Department shall issue a license if "[t]he locality in which the proposed marijuana establishment will be located ***does not affirm to the Department that the proposed marijuana establishment will be in violation of zoning or land use rules adopted by the locality***" (emphasis added). The language of this exception is limited and specific. Thus, under the enabling statutes, the *only* consideration given to a specific locality is when that locality *affirmatively notifies the Department that the proposed marijuana establishment would violate its zoning or land use rules.*[1] And accordingly, the Department cannot deny a license solely because the applicant's proposed location does not fit the Department's own unauthorized local population allocation rule imposed by NAC 453D.272 in conflict with NRS 453D.210(5).

When an agency's regulation is not within the scope of statutory language delimiting its authority, the regulation is invalid. *Village League*, 388 P.3d at 226. In *Village League*, the Nevada Supreme Court struck down a regulation that purported to allow the State Board of

[1] The Department apparently recognizes this restriction to some degree, in that NAC 453D.272(2) states that the Department will not require proof of compliance with local zoning and land use regulations to be submitted with an application, and will not consider such approval when ranking applications.

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Equalization to order reappraisals of certain properties, holding that "[b]ecause NAC 361.665(1)(c)'s purported grant of power is not within the language of' NRS 361.395, or any other statutory provision, we conclude that the State Board's interpretation is unreasonable and in excess of its statutory authority." *Id.*

Likewise, NAC 453D.272 is "not within the language" of NRS Chapter 453D. Nothing in the statutory scheme authorizes the Department to decide which specific localities within a county will get licenses, and how many. Indeed, NAC 453D.272 directly conflicts with NRS 453D.210(5) and (6), which require the Department to conduct a *county-wide* competitive bidding process. Thus, as in *Village League*, the Regulation exceeds the Department's statutory authority, and is therefore unenforceable. And accordingly, the licenses issued pursuant to the Department's illegal ranking and allocation method are likewise invalid.

B.

The Regulation Violates NRS 453D.210 By Employing Unauthorized, Arbitrary, Irrelevant, Vague, Ambiguous, Undisclosed And Unpublished Criteria To Rank Applications.

The Department has also exceeded its statutory authority by creating a competitive bidding process that textually takes into account not only enumerated, facially arbitrary criteria that are not "directly and demonstrably related to the operation of a marijuana establishment," as required by the Ballot Initiative and NRS Chapter 453D, but textually purports to permit licensing determinations to be based on any additional, unspecified, undisclosed and unpublished criteria that the Department deems relevant, and which therefore cannot be determined to be of such requisite delimited character.

Thus, while NRS 453D.200 permits the Department to adopt regulations to carry out the purposes of that chapter, it does not give the Department carte blanche to enact any and all regulations it might wish to impose. Instead, NRS 453D.200(1)(b) textually mandates that the regulations "***shall***" only impose criteria for licensure that "***directly and demonstrably relate to the operation of a marijuana establishment***" (emphasis added). Furthermore, NRS 453D.200(2) mandates that the Department "***shall*** approve or deny applications for licenses ***pursuant to NRS***

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453D.210" (emphasis added). And NRS 453D.210(6) requires that the "Department ***shall*** use an ***impartial*** and ***numerically scored competitive bidding process*** to determine which among those competing applications will be approved" (emphasis added).

However, in the event that there are more applicants than licenses to be issued, NAC 453D.272(1) sets forth application ranking criteria that are *neither* "impartial" nor "directly and demonstrably relate[d]" to the operation of a marijuana establishment. These criteria include: "[o]perating experience ***of another kind of business***"; "***[d]iversity*** of the owners, officers or board members"; "***the amount of taxes paid and other beneficial financial contributions***"; "***[e]ducational achievements*** of the owners, officers or board members"; "The ***financial. . . resources of the applicant, both liquid and illiquid***"(emphasis added).

Thus, with due regard to the desirability of diversity generally, a person's race, gender, religion, and so forth are completely irrelevant to one's qualifications "to. . . operat[e]. . . a marijuana establishment." Nor is consideration of such factors "impartial." The same is also true of the regulation's requirement that the Department consider ***"[t]he amount of taxes paid and other beneficial financial contributions***," including, without limitation, civic or philanthropic involvement with this State or its political subdivisions and "[t]he ***financial. . . resources of the applicant***" (emphasis added).

Indeed, these criteria clearly, arbitrarily, and gratuitously favor large corporations over smaller businesses, and the very wealthy over those of more moderate means.

Moreover, NAC 453D.272(1)(i) further textually permits the Department to rank applications based on "***[a]ny other [undisclosed and unpublished, additional] criteria that the Department determines to be relevant***" (emphasis added). Thus, this subsection expressly purports to allow the Department to literally use absolutely *any* criteria it wants to. And therefore, the Regulation textually purports to permit the Department to exercise *unbridled discretion* to rank applications based on unauthorized, unaccountable, and undisclosed criteria as well as criteria that are unaccountably arbitrary, vague and ambiguous, unknown to the applicants and the public, and that could differ substantially in their assessment from one Department employee to the next. And the plain language of the Regulation therefore manifestly

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violates the respective requirements of NRS 453D.200(1)(b), 453D.200(2), and NRS 453D.210(6) that the ranking criteria be "***directly and demonstrably related to the operation of a marijuana establishment***" and that the competitive bidding process employed be "***impartial***" (emphasis added).

And consistent therewith, Section 6.3 of the conditional licensing application form created and issued by the Department (Exhibit "B") states that "[a]pplications that have not demonstrated a sufficient response related to the [specifically enumerated] criteria set forth above will not have ***additional [undisclosed, unpublished] criteria*** considered in determining whether to issue a license ***and will not move forward in the application process***" (emphasis added). Thus, conversely, by necessary implication, Section 6.3 of the application form textually subjects an application which *has* in fact demonstrated a *sufficient* response related to the specifically enumerated, published criteria set forth above to "***additional [unspecified, unpublished] criteria***"— consideration of which by the Department will determine whether or not a license application will "***move forward in the application process***," and whether or not a license is ultimately issued (emphasis added).

In short, NAC 453D.272 creates a competitive bidding process that is anything but impartial and imposes ranking criteria that are not directly and demonstrably related to operating a marijuana establishment in clear excess of the Legislature's delimited delegation of discretion to the Department. And whereas "[a]dministrative regulations cannot contradict or conflict with the statute they are intended to implement," (*Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988)), the Regulation is invalid, and the Department's licensing determinations pursuant thereto must be set aside.

C.

The Department Failed To Issue The Number Of Licenses Required By Statute.

NRS 453D.210(5)(d) sets presumptive caps on the number of licenses for marijuana retail stores in each county, according to county-wide population, but allows the Department to issue more licenses, if the county requests it to do so. Under NRS 453D.210(5)(d)(1) the cap in Clark

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County is 80 licenses. However, the Department issued only 79 licenses in Clark County.

The Department does not have authority to limit the number of licenses allowed by the statute. Thus, NRS 453D.210(5) provides:

> "The Department ***shall approve*** a license application if:
>
> (a) The prospective marijuana establishment has submitted an application in compliance with regulations adopted by the Department and the application fee required pursuant to NRS 453D.230;
>
> (b) The physical address where the proposed marijuana establishment will operate is owned by the applicant or the applicant has the written permission of the property owner to operate the proposed marijuana establishment on that property;
>
> (c) The property is not located within:
>
> (1) One thousand feet of a public or private school that provides formal education traditionally associated with preschool or kindergarten through grade 12 and that existed on the date on which the application for the proposed marijuana establishment was submitted to the Department; or
>
> (2) Three hundred feet of a community facility that existed on the date on which the application for the proposed marijuana establishment was submitted to the Department;
>
> (d) ***The proposed marijuana establishment is a proposed retail marijuana store and there are not more than***:
>
> (1) ***Eighty licenses already issued in a county with a population greater than 700,000***;
>
> (2) Twenty licenses already issued in a county with a population that is less than 700,000 but more than 100,000;
>
> (3) Four licenses already issued in a county with a population that is less than 100,000 but more than 55,000;
>
> (4) Two licenses already issued in a county with a population that is less than 55,000;
>
> (5) Upon request of a county government, the Department may issue retail marijuana store licenses in that county in addition to the number otherwise allowed pursuant to this paragraph;
>
> (e) The locality in which the proposed marijuana establishment will be located does not affirm to the Department that the proposed marijuana establishment will be in violation of zoning or land use rules adopted by the

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locality; and

(f) The persons who are proposed to be owners, officers, or board members of the proposed marijuana establishment:

(1) Have not been convicted of an excluded felony offense; and

(2) Have not served as an owner, officer, or board member for a medical marijuana establishment or a marijuana establishment that has had its registration certificate or license revoked."

(Emphasis added.)

The statute is *mandatory*. The Department *must* issue a license if the applicant meets all of the legal criteria "and there are not more than" the statute's allowed number of licenses already issued.

NRS 453D.210(1) requires that the Department must begin accepting applications for marijuana establishments "no later than 12 months after January 1, 2017." NRS 453D.210(4) requires the Department to approve or deny an application within 90 days of receipt. The intent of these provisions is clearly to prevent administrative foot-dragging that would thwart or delay the will of the voters, whether done intentionally or not. Nothing in NRS Chapter 453D permits the Department to limit the number of applications it will consider, the number of licenses it will issue, or issue them beyond the parameters of a time certain.

However, the Department has done just that. The Department issued only 79 licenses in Clark County, when NRS 453D.210(5) allows for 80, and there were more than 80 qualified applicants. It is unknown why the Department refused to issue all 80 licenses. One explanation could be that the two remaining licenses would not fit the Department's legislatively-unauthorized requirement that the licenses be distributed to certain localities *within* Clark County.

In any event, the reason is irrelevant. The Department's failure to issue all 80 licenses in Clark County, when there were more than 80 qualified applicants, violates NRS 453D.210(5), which mandates that the Department issue licenses to qualified candidates if the statutory cap on the number of licenses has not been met. The Department's failure to do so demonstrates that its process for awarding licenses was contrary to law, and must be set aside.

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D.

The Department Engaged In Illegal, *Ad Hoc* Rule-Making By Limiting Each Applicant To Only One License Per Locality.

Another possible reason the Department failed to issue all 80 licenses in Clark County could be that the Department simply refused, absent statutory authority, to issue an applicant more than one license in each of the specified localities. Thus, the Department's application for a marijuana establishment (Exhibit "B") states, on page 8: "No applicant may be awarded more than 1 (one) retail store license in a jurisdiction/locality, unless there are less applicants than licenses allowed in the jurisdiction."

A "regulation" includes an "agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." NRS 233B.038(1)(a). "An agency makes a ***rule*** when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function." *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986) (emphasis added).

It is plain that the limit of one license per locality affects the substantive legal rights of the applicants and constitutes an "agency rule" that attempts to effectuate law or policy and describes the procedure of an agency. However, there is nothing in either the statutory scheme or in NAC Chapter 453D that provides for that limitation. Accordingly, the Department's policy that no applicant may be awarded more than one license per locality constitutes *ad hoc* rule-making in violation of the Administrative Procedures Act.

The Department's process for awarding licenses in at least Clark and Washoe Counties was fatally flawed because of its reliance on this invalid "one license" policy. Without this illegal policy, it is very likely that the Department would have issued licenses to different applicants, and/or a different number of licenses in the various localities, and it would have issued the correct number of licenses, as required by NRS 453D.210(5). Because the Department's illegal "one license" policy infected its process for awarding licenses, that process, at least as applied to

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those counties was therefore invalid.

E.

The Department Allocated And Issued Licenses In Violation Of Its Own (Albeit Otherwise Invalid) Regulation By Exceeding The Cap On The Number Of Licenses That Can Be Issued To A Single Company And By Failing To Fairly And Objectively Score Applications.

The Department's licensing determinations should also be invalidated because the Department failed to follow, not only the enabling statutes, but also its own (albeit otherwise invalid) regulations. First, the Department issued more licenses to a single company than is permitted under the Regulation's anti-monopoly provisions. Second, the Department scored applications in a manner that is statistically impossible under an impartial, objective, and fair scoring process.

Dr. Amei Amei is a statistician and associate professor of mathematics at UNLV. She performed an analysis of the number of licenses issued and data from a sample of applicants. Based on that analysis, she concludes that: (1) the Department issued more licenses to a single company than is permitted by the anti-monopoly provisions of NAC 453D.272; and (2) that the Department did not accurately and objectively score the applications. Dr. Amei's Affidavit, Report, and Curriculum Vitae are attached hereto as "Collective Exhibit D."

1.

The Department Exceeded The Cap On The Number Of Licenses That Can Be Issued To A Single Company.

Although NRS 453D.210 sets forth criteria for licensure at a county level, the Regulation states that "[t]he Department will allocate the licenses for retail marijuana stores described in paragraph (d) of subsection 5 of NRS 453D.210 to jurisdictions within each county and to the unincorporated area of the county proportionally based on the population of each jurisdiction and of the unincorporated area of the county." NAC 453D.272(3).

Pursuant to that provision of the Regulation, the Department allocated the number of licenses it would issue according to the population of various local jurisdictions within a county, allocating licenses for Clark County as follows:

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Licensing Authority	Number of New Licenses
Henderson	6
Las Vegas	10
Mesquite	0
North Las Vegas	5
Unincorporated Clark County	10
Total:	**31**

Prior to the Department issuing these 31 new licenses, there were a total of 48 existing licenses for retail stores in Clark County. Thus the Department allocated a total of 79 licenses to the various jurisdictions in Clark County.

And, in this manner, the Department allocated licenses for Washoe County as follows:

Licensing Authority	Number of New Licenses
Reno	6
Sparks	1
Unincorporated Washoe County	0
Total:	**7**

Prior to the allocation of new licenses, there were a total of 13 licenses issued in Washoe County. Accordingly, the Department has allocated all 20 licenses allowed under NRS 453D.210(5) in Washoe County.

NAC 453D.272(5) provides:

> "To prevent monopolistic practices, the Department will ensure, in a county whose population is 100,000 or more, that the Department does not issue, to any person, group of persons or entity, **the greater of**:
>
> (a) One license to operate a retail marijuana store; or
>
> (b) More than 10 percent of the licenses for retail marijuana stores allocable in the county."

(Emphasis added.)

As set forth in her attached report, Dr. Amei analyzed the number of licenses issued using two methods. Under the first method, Dr. Amei interpreted "10 percent of the licenses. . . allocable in the county" to refer to the *new* licenses the Department allocated. And under the second method, Dr. Amei interpreted "allocable in the county" to refer to the *total* number of licenses the Department had allocated for a given county.

Under the first method, the Department cannot issue more than three of the new licenses to any one company in Clark County, because 10% of the 31 new licenses allocated to Clark County = 3.1, which is greater than 1. For Washoe and Carson City, the Department cannot issue

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more than one of the new licenses to any one company, because in both Washoe and Carson City, 1 license is greater than 10% of the new licenses allocated, *i.e.*, 10% * 7 = 0.7 and 10% * 2 = 0.2, respectively.

Dr. Amei concluded that, under the first method, the Department violated NAC 453D.272(5) because it issued "Essence" five (5) licenses in Clark County, which is greater than the limit of three. It also violated the regulation by issuing Essence two licenses in Washoe, which is greater than the cap of one license.[2]

Under the second method, Dr. Amei calculated the limit imposed by NAC 453D.272(5) including all the licenses the Department allocated to each county. The limit for Clark County is 7 licenses because 10% * 79 = 7.9, which is greater than 1.[3] The limit for Washoe County is two licenses, because 10% * 20 = 2, which is greater than 1.

Dr. Amei concluded that, under the second method, the Department issued licenses in Washoe and Carson City consistent with the Regulation. However, the Department violated NAC 453D.272(5) by issuing "Essence" a total of 8 licenses in Clark County.

In sum, Dr. Amei found that, under *either* method, the Department violated the anti-monopoly provisions by granting more licenses to "Essence" than is permitted.

Because there is no data available showing how licenses were allocated to the other companies operating retail stores, Dr. Amei was unable to analyze the anti-monopoly provisions with respect to other companies, in that the applicable provisions of the Regulation apply per county. However, Dr. Amei found that only 4 companies control nearly half of the retail store licenses in the State. And given that the Department has issued "Essence" more licenses than permitted under the anti-monopoly provisions, it is possible, if not likely, that the Department has also issued licenses in excess of the limits to other companies as well.

. . .

. . .

[2] The Department issued "Essence" one license in Carson City, which is consistent with the Regulation.

[3] It is impossible to issue a fractional license, and the limit is less than 8 licenses, therefore the fraction must be rounded *down*.

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2.

The Department Did Not Fairly And Objectively Score The Applications.

The Department did not score the applications objectively or accurately. Many of the scores were remarkably similar, and in some cases, exactly the same, despite differences in the contents of the applications. It is a statistical impossibility that this would occur if the Department had used an objective, accurate, and fair scoring process.

As discussed *supra*, the Department announced that it would issue licenses to those applicants who score and rank high enough in each jurisdiction to be awarded one of the allocated licenses. And each applicant was required to submit a separate application for each local jurisdiction. While some parts of those applications would be the same, other parts would differ due to the different proposed location, different requirements of the locality, etc. Consequently, the scores on those applications would normally be different as well – assuming they were scored and ranked in an objective fashion.

Dr. Amei determined that the difference in the content of the applications is around 10% to 15%. And she analyzed the scores on a sample of applications that were submitted by the same companies to various local jurisdictions, using the lower 10% bound to be conservative.

In the first case, the applicant received six scores: 207.66, 207.33, 209, 209.66, 209.66, 209.66. These scores are all within 2.33 points or less of each other. Using the lower bound of a 10% difference between the applications, Dr. Amei analyzed the probability that the scores would be so similar under an objective and accurate scoring system. And she concludes that the probability of all six scores being so similar is only 0.0002, which is extremely unlikely.

In the second case, the applicant received exactly the same score of 196.67 on all six of its applications. And Dr. Amei calculates that the probability of this occurring is 4.67e-11, which is equivalent to 0. In other words, Dr. Amei has concluded that had an accurate and objective scoring system been used, it is statistically impossible that the scores on all six applications would be exactly the same.

Dr. Amei's analysis demonstrates that the Department did not comply with NAC 453D.272(1), which states that the Department will rank applications "within each applicable

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locality" according to the criteria set forth therein. Her analysis further shows that the Department violated NRS 453D.210(6), which requires that the Department use an "impartial and numerically scored competitive bidding process to determine which application or applications among those competing will be approved." For certainly, a process that results in statistically impossible scores is not impartial.

Thus, the Department did not rank license applicants in an impartial, fair, and objective manner. Instead, it scored applications in a manner that would be statistically impossible under an objective process. Additionally, the Department violated its own regulation prohibiting monopolistic practices by issuing more licenses to a single entity than the regulation permits. This evidence shows that the Department's process for awarding licenses violated the mandate of NRS 453D.210(6) that it use an impartial competitive bidding process. The Department's actions must therefore be set aside, and it must be enjoined from taking any further action on the 31 new licenses, including but not limited to issuing permanent licenses.

II.

THE PROVISIONS OF THE REGULATION ARE FACIALLY REPUGNANT TO FEDERAL AND STATE CONSTITUTIONAL PROVISIONS.

A.

The Regulation Textually Permits The Arbitrary And Capricious Deprivation Of A Qualified And Prevailing, Properly-Ranked Applicant's Property Interest In Conditional Licensure In Derogation Of Such An Applicant's Statutory Entitlement Thereto Under The Provisions Of NRS 453D.200 And NRS 453D.210, And Therefore In Violation Of The Due Process Protections Guaranteed By The Fourteenth Amendment To The Constitution Of The United States And Article 1, Sections 1 And 8 Of The Constitution Of The State Of Nevada.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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Article 1, Section 8.5 of the Constitution of the State of Nevada likewise provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 1 of the Nevada Constitution further provides:

> "All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness."

The purpose and intent of the imperative of due process in both its procedural and substantive applications is to protect life, liberty and property interests against their arbitrary and capricious deprivation or otherwise than in accordance with mandated procedures. Thus, in analyzing such issues in cases such as this, a court must determine whether a protected liberty or property interest is implicated, entitling a party aggrieved by administrative action to constitutional due process protection against its arbitrary or capricious deprivation. For as the Nevada Supreme Court recently held in *Nuleaf CLV Dispensary, LLC v. State of Nevada Department of Health and Human Services, et al.*, ___ Nev. ___, 414 P.3d 305, 308 (2018), in the specific context of Marijuana business licensing regulations: "An agency's interpretation of a statute that it is authorized to execute is . . . [not] entitled to deference . . . [if] 'it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious'" (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006)). Thus, as our Supreme Court explained in *Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010): "When examining whether an administrative regulation is valid, we will generally defer to the 'agency's interpretation of a statute that the agency is charged with enforcing.' *State, Div. of Insurance v. State Farm,* 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). However, we will not defer to the agency's interpretation if, for instance, the regulation 'conflicts with existing statutory provisions or exceeds the statutory authority of the agency.' *Id.* We have established that 'administrative regulations cannot contradict the statute they are designed to implement.' *Jerry's Nugget v. Keith,* 111 Nev. 49, 54, 888 P.2d 921, 924 (1995)."

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As the *Nuleaf* Court determined, in light of its resolution of that case on other grounds: "We . . . need not reach GB and Acres' arguments on cross-appeal regarding entitlement to Nuleaf's registration certificate." Note 2. However, a properly qualified candidate's "*entitlement*" to the issuance of conditional recreational marijuana store license pursuant to principles of substantive and procedural due process is a question that is squarely presented in the case at bar.

Property and liberty interests are not *created* by the Constitution, but arise under an *independent source* such as state law. However, where they do so obtain, the imperative of due process operates to preclude their deprivation arbitrarily, capriciously, or otherwise than in accordance with prescribed procedures. Such interests can be created by "statutory entitlement," the operation of institutional common law, historic custom and usage, or principles of contract law. And such interests can attach to the issuance of a necessary government license to engage in a particular activity. In determining whether a plaintiff enjoys a protected property or liberty interest in the issuance of a license, permit, or other benefit by virtue of a state statutory entitlement pursuant to a particular, legislatively-prescribed procedure, a court must determine whether *mandatory* language set forth therein by the legislature, *limiting the exercise of broad discretion by a regulatory agency*, creates a legitimate claim of substantive or procedural *entitlement*. And accordingly, this will necessarily depend on a specific assessment in each case. *Mathews v. Eldridge,* 424 U.S. 319 (1976) (social security disability benefits); *Perry v. Sindermann*, 408 U.S. 593 (1972) (tenure); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (tenure); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (welfare benefits); *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 180, 162 P.3d 148, 154–55 (2007) ("Valdez has a statutorily created property interest in the continued receipt of workers' compensation benefits that the State may not abrogate without due process under the Fourteenth Amendment to the United States Constitution. Further, Valdez's property interest in receiving these benefits attached once he fulfilled the requirements of his entitlement under Nevada law"); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 199 (2005) ("[t]he revocation of a driver's license implicates a protectable property interest entitling the license holder to due

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process").

Accordingly, the Ninth Circuit has held that a state statute creates a legitimate claim of entitlement to a government license, permit or benefit when it imposes significant limitations on the discretion of the administrative decision maker. *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1019–20 (9th Cir. 2011), cert. denied, 132 S. Ct. 249 (2011). *Accord, e.g., Pritchett v. Alford*, 973 F.2d 307, 317 (4th Cir. 1992) (plaintiff had property interest in being on state-prescribed wrecker-service list in light of regulations directing that such list be administered fairly and in a manner designed to ensure that all wrecker services on the list have an equal opportunity to acquire towing business); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1156-1157 (4th Cir. 1991) (a license issued by a state which can be suspended or revoked only upon showing of cause or for certain stated reasons creates a property interest protected by the Fourteenth Amendment and entitlement to renewal of the license may be implied from policies, practices and understandings or from mutual expectations); *Silberstein v. City of Dayton*, 440 F.3d 306, 312–15 (6th Cir. 2006) (assistant examiner for city civil service board had a property interest in continued employment because city charter categorized the position as "classified" and classified employees were given the right to specific termination procedures); *Paskvan v. City of Cleveland Civil Service Com'n*, 946 F.2d 1233, 1237 (6th Cir. 1991) (district court erred in dismissing plaintiff's procedural due process claim where plaintiff alleged that defendant's course of conduct created implied contract or mutually explicit understanding regarding promotion based on test scores); *Cushman v. Shinseki*, 576 F.3d 1290, 1297-1300 (Fed. Cir. 2009) (court joins seven sister circuits in holding that applicants for benefits may possess a property interest in the receipt of public welfare entitlements, and here, because veteran's disability benefits are nondiscretionary and statutorily mandated, entitlement to such benefits is a property interest); *Furlong v. Shalala*, 156 F.3d 384 (2d Cir. 1998) (although statute that simply provides standard for review of agency action cannot furnish substantive basis for claim of entitlement to property interest, property interest may be established through such sources as unwritten common law and informal institutional policies and practices and thus anesthesiologist demonstrated a cognizable property interest in recovering a Medicare-approved charge based on

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a constant, consistent pattern of decisions); *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409-413 (6th Cir. 2002) (ambulance company had a property interest in city-issued license to provide ambulance services);

Whereas, in contradistinction, the Ninth Circuit has held that where statutory language confers *unfettered discretion* upon administrative officials, a statutory entitlement does not attach. *Shanks v. Dressel*, 540 F.3d 1082, 1090-92 (9th Cir. 2008) (even assuming a property owner may have a constitutionally protected interest in the proper application of zoning restrictions to neighboring properties, plaintiffs did not have a legitimate claim of entitlement to the denial of developers' permit in accordance with historic preservation provisions because the governing ordinance vested *unfettered discretion* in the reviewing party to deny or approve the application and thus there was no protected property interest); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164-66 (9th Cir. 2005) (state license that can be revoked only for cause creates a property interest, but where statute grants reviewing body *unfettered discretion* to approve or deny application, no property right exists; thus, wrecking yard owners who failed to secure approval to renew their licenses lacked protected property interest in renewal since state statute gave city *unfettered discretion* to deny renewal application and therefore did not create property interest). *Accord, e.g., Harrington v. County of Suffolk*, 607 F.3d 31, 34-35 (2d Cir. 2010) (a benefit is not a protected entitlement if government officials may grant or deny it in their *unfettered discretion*, and thus statute that requires police department to preserve the peace, prevent crime, and detect and arrest offenders, does not confer on the victims of crime a property interest in a police investigation that conforms with certain minimal standards; further, the ordinance confers a benefit on the public generally, rather than creating an individual entitlement, which is required to qualify as a property interest protected by the Due Process Clause); *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997) (plaintiffs had no due process property interest in waiver of termination of their existing contracts nor in possible future license to collect trade waste where local law gave Commission *broad discretion* to grant or deny license applications); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378, 379 (2d Cir. 1995) (entitlement to property interest exists only when discretion of

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issuing agency is *circumscribed*); *Colson on Behalf of Colson v. Sillman*, 35 F.3d 106, 109 (2d Cir. 1994) (whether statutory benefit scheme invests applicant with claim of entitlement or with merely unilateral expectation is determined by amount of discretion that disbursing agency retains); *Walz v. Town of Smithtown*, 46 F.3d 162, 268 (2d Cir. 1995) (legal claim of entitlement exists where discretion of issuing agency is *circumscribed*); *Bayview-Lofberg's, Inc. v. City of Milwaukee*, 905 F.2d 142, 145-146 (7th Cir. 1990) (since municipal ordinance did not provide that upon meeting statutory and municipal requirements applicant for liquor license is entitled to license, plaintiff did not have a property interest protectable under the due process clause); *Austell v. Sprenger*, 690 F.3d 929, 935–36 (8th Cir. 2012) (state law provided a property interest by statutory entitlement).

In the present context, the Ninth Circuit case of *Wedges/Ledges of California, Inc., City of Phoenix, Arizona,* 24 F.3d 56 (9th Cir. 1994) is particularly instructive. Thus, as the Ninth Circuit explained in that case:

> A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution. *Board of Regents v. Roth,* 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Kraft v. Jacka,* 872 F.2d 862, 866 (9th Cir.1989).
>
> ***A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from "existing rules or understandings that stem from an independent source such as state law***." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. "A reasonable expectation of entitlement is determined largely by ***the language of the statute and the extent to which the entitlement is couched in mandatory terms***." *Association of Orange Co. Deputy Sheriffs v. Gates,* 716 F.2d 733, 734 (9th Cir.1983), *cert. denied,* 466 U.S. 937, 104 S.Ct. 1909, 80 L.Ed.2d 458 (1984). Although procedural requirements ordinarily do not transform a unilateral expectation into a protected property interest, ***such an interest is created "if the procedural requirements are intended to be a 'significant substantive restriction' on ... decision making***." *Goodisman v. Lytle,* 724 F.2d 818, 820 (9th Cir.1984) (citations omitted).

24 F.3d at 62 (emphasis added).

In *Wedges/Ledges*, the manufacturer and former distributors and owners of an arcade "crane" amusement game called "The Challenger" initiated a lawsuit under 42 U.S.C. § 1983 against the City of Phoenix, the Phoenix License Appeal Board, and members of the License Appeal Board (collectively "the City") based upon the denial of licenses to operate the game,

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alleging violation of their right to due process. The district court found that the plaintiffs had not shown either that they had a liberty or property interest in the crane game licenses, and accordingly decided that the denial of licensure did not violate their due process rights.

The provision of the local code governing licensing of amusement games provided in pertinent part as follows:

> "A. Coin–Operated Game Machines—Skill Games.
>
> Only coin machines which are approved by the City Treasurer as games of skill may be operated as an amusement within the City of Phoenix.
>
> B. Approval of Coin–Operated Games as Skill Games.
>
> 3. The City Treasurer ***shall make a determination as to whether or not [a proffered machine] qualifies as a game of skill based upon an evaluation of the machine and recommendation by the police department and other relevant information*** . . . .
>
> C. Issuance and Display of the Machine, Identification Tags to Approved Machines .
>
> 1. Owners of coin-operated game machines approved by the City Treasurer as games of skill ***shall be issued identification tags by the City Treasurer for each game approved by the City Treasurer***."

(Emphasis added.)

On appeal, the Ninth Circuit reversed, holding that, with respect to eligible applicants thereunder, the *mandatory standards* imposed by the language of the foregoing provisions—by limiting the licensing authority's exercise of discretion in determining *qualification* for licensure—created an *entitlement* thereto—and a consequent *property interest* therein—within the meaning and subject to the due process protections of the Fourteenth Amendment.

> The City claims that these provisions do not significantly constrain the discretion of the City Treasurer and thus do not create a legitimate expectation of entitlement on the part of license applicants. In particular, the City argues that the provisions lack the "explicitly mandatory language" necessary to create an entitlement. ***We disagree.***
>
> Section 7–28(B)(3) expressly provides that "[t]he City Treasurer ***shall*** make a determination as to whether or not [each proffered coin-operated game] qualifies as a game of skill." Once this determination is made in the affirmative, § 7–28(C)(1) provides that a game license tag "***shall be issued.***" ***The use of the imperative in these provisions is sufficient to create an expectation in applicants***

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that, as long as their machines qualify as games of skill, they have a right to obtain license tags. Although the Code directs the City Treasurer to consider all "relevant information" when making its determination, it does not allow the City Treasurer to rest its decision on anything other than the "game of skill" determination; the Code does not provide any open-ended discretionary factors. Accordingly, the question of whether the Code creates a property interest in new licenses turns solely on whether the "game of skill" criterion serves as a significant substantive restriction on the City Treasurer's discretion.

The City argues that the game of skill determination requires the exercise of broad discretion, and the City cites to *Jacobson v. Hannifin,* 627 F.2d 177 (9th Cir.1980), in support of this proposition. The City's reliance on *Jacobson* is misplaced. ***Jacobson involved a Nevada gaming statute that expressly granted the licensing body "full and absolute power and authority" to deny license applications "for any reason deemed reasonable."*** *Id.* at 180. The wide discretion conferred by the Nevada statute contrasts sharply with the narrow "game of skill" criterion at the heart of the Phoenix licensing statute. The City Treasurer's determination, moreover, is constrained further by P.C.C. § 7–3, which defines the term "game of skill" as "any game, contest, or amusement of any description in which the designating element of the outcome ... is the judgment, skill, or adroitness of the participant in the contest and not chance." This definition, derived from the interpretation Arizona courts gave to the predecessor statute to A.R.S. § 13–3302, further constrains the game of skill determination through its implicit directive that even games containing elements of chance can qualify as games of skill as long as skill is the "designating element of the outcome."

Taken together, the provisions of the Phoenix City Code create an "articulable standard" sufficient to give rise to a legitimate claim of entitlement. *Parks v. Watson,* 716 F.2d 646, 657 (9th Cir.1983) (finding that criteria for vacating plotted city streets created a property interest notwithstanding the fact that one of the criteria broadly directed the decision-maker to consider "the public interest," and noting that "a determination as to whether the public interest will be prejudiced, while obviously giving a certain amount of play in the decisional process, defines an articulable standard."); *cf. Allen v. City of Beverly Hills,* 911 F.2d 367, 371 (9th Cir.1990) (holding that a provision allowing the Beverly Hills City Council to abolish any position in the classified service when "necessary in the interests of the economy or because the necessity for the position no longer exists" does not significantly constrain the City's discretion and thus does not create a property interest); *Kraft,* 872 F.2d at 867 (holding that a Nevada statute granting Gaming Control Board "full and absolute power and authority" to deny license applications "for any reason deemed reasonable by the Board" does not create a property interest).

Accordingly we hold that the district court erred when it ruled that the Challenger operators did not have a property right in obtaining new license tags.

24 F.3d at 63–64 (emphasis added).

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Thus, as the court explained in *Grabhorn, Inc. v. Metropolitan Service District,* 624 F.Supp.2d 1280, 1286 (D. Oregon 2009):

> ***Permit and licensing applicants have a property interest protected by the Due Process Clause when "the regulations establishing entitlement to the benefit are ... mandatory in nature***." *Foss v. Nat'l Marine Fisheries Serv.,* 161 F.3d 584, 588 (9th Cir.1998)
>
> [Thus,]. . . ***if the governing statute compels a result "upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body***," . . . ***it create[s] a constitutionally protected property interest.*** *Thornton v. City of St. Helens,* 425 F.3d 1158, 1164–65 (9th Cir.2005); *see also Foss v. Nat'l Marine Fisheries Serv.,* 161 F.3d 584, 588 (9th Cir.1998) (***holding that "specific, mandatory" and "carefully circumscribed" requirements constrained discretion enough to give rise to property interest***). Conversely, "a statute that grants the reviewing body ***unfettered discretion*** to approve or deny an application does not create a property right." *Thornton,* 425 F.3d at 1164. There is no protected property interest ***if "the reviewing body has discretion ... to impose licensing criteria of its own creation***." *Id.* at 1165.

(Emphasis added.)

As the *Grabhorn* court explained: "Here, the Metro Code does not give the discretion to the Council . . . [to apply] ***open-ended criteria***," and therefore held that "the Metro Code sections at issue are sufficiently mandatory to create a constitutionally protected property interest." 624 F. Supp. 2d at 1288. *See also e.g., T.T., Plaintiff v. Bellevue School District,* No. C08-365RAJ, 2010 WL 5146341 (W.D. Washington 2010).

Here, the provisions of NRS 453D.200.2 and NRS 453D.210.4-6—the governing statutes –*affirmatively mandate* that the Department "***shall***" approve and issue the appropriate license within a time certain if, together with the required application fee, the prospective establishment submits an application in compliance with published Department regulations *promulgated in accordance with the limitations imposed by NRS 453.D.200.1(b), so as to require that "****[q]ualifications for licensure [be] directly and demonstrably related to the operation of a marijuana establishment.****"* And further mandate that, in the case of competing applications, the Department "***shall***" approve and issue the appropriate license within a time certain if an applicant outranks competing applicants in accordance with an objective, "***impartial and numerically scored competitive bidding process***."

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Thus, these provisions impose significant, specific, mandatory, and carefully circumscribed limitations on the discretion of the licensing authority in determining *qualification* for licensure in accordance with such specifically delineated and "demonstrable" criteria. And therefore, they hardly confer *unfettered discretion* upon administrative officials to grant or deny licenses based upon "open-ended criteria" of their own.

As elucidated by the foregoing authorities, these provisions therefore serve to create, as a matter of textual legislative mandate, a *statutory entitlement* to receipt of the license by applicants who comply with and competitively prevail in accordance with such specific, "demonstrable" qualification requirements, and—in the case of competing applications—such an "impartial" and "numerically scored" "competitive bidding process." Such a statutory entitlement constitutes a "property interest" within the meaning and subject to the due process protections of the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada. And accordingly, may not be denied arbitrarily, capriciously, corruptly or based upon administrative partiality, favoritism, or the mere *commandeering* of unfettered discretion which has not been legislatively-conferred upon the licensing authority.

However, acting under color of state law, the Department has effectively nullified and rendered this legislatively-mandated statutory entitlement to conditional licensure of qualified applicants illusory, by textually subjecting an application to its legislatively-unauthorized and presumptuous unfettered discretion in the ways and manners described *supra*, and thereby rendering the current Regulation governing the application and licensing process susceptible to opaque, *ad hoc,* arbitrary, capricious or corrupt decision-making based upon administrative partiality or favoritism which cannot be accounted for; and therefore, unconstitutional on its face.

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B.

The Regulation Textually Permits The Arbitrary And Capricious Deprivation Of A Qualified And Prevailing, Properly-Ranked Applicant's Liberty Interest In Conditional Licensure In Derogation Of Such An Applicant's Statutory Entitlement Thereto Under The Provisions Of NRS 453D.200 And NRS 453D.210, And Therefore In Violation Of The Due Process Protections Guaranteed By The Fourteenth Amendment To The Constitution Of The United States And Article 1, Sections 1 And 8 Of The Constitution Of The State Of Nevada And The Fundamental Constitutional Right To Pursue A Lawful Occupation.

In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the United States Supreme Court explained that the liberty protected against deprivation without due process includes the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." And as the courts have since consistently recognized there is such a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment to pursue any lawful occupation.

Thus, as the Ninth Circuit explained in *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 66 (9th Cir. 1994):

> ***[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations***, *see Greene v. McElroy,* 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959) (aeronautical engineer); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238–39, 77 S.Ct. 752, 755–56, 1 L.Ed.2d 796 (1957) (law practice); *Benigni v. City of Hemet,* 879 F.2d 473, 478 (9th Cir.1988) (bar ownership), and we assume without deciding that the operation of skill-based amusement games is within this range, *cf. Chalmers v. City of Los Angeles,* 762 F.2d 753, 756–57 (9th Cir.1985) (holding that selling t-shirts from a vending cart is an occupation protected under the Constitution). ***Moreover, corporations, as legal persons, also can assert a right to pursue an occupation***. *See Physicians' Serv. Med. Group v. San Bernardino County,* 825 F.2d 1404, 1407 (9th Cir.1987) ("A corporation ... is a 'person' possessing Fourteenth Amendment due process rights.") (citing *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 778–80, 98 S.Ct. 1407, 1416–18, 55 L.Ed.2d 707 (1978); *Old Dominion Dairy Products Inc. v. Secretary of Defense,* 631 F.2d 953, 962 (D.C.Cir.1980) ("[A] corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protections under the Constitution than an individual to engage in such pursuits").

(Emphasis added.)

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And accordingly, as the court pointed out in *Speed's Auto Services Group, Inc. v. City of Portland, Oregon,* No. 3:12-CV-738-AC, 2014 WL 2809825 at *4 (D. Oregon June 20, 2014), *aff'd sub nom. Speed's Auto Servs. Grp., Inc. v. City of Portland, Oregon*, 685 F. App'x 629 (9th Cir. 2017):

> The "liberty component of the Fourteenth Amendments Due Process Clause includes . . . [the] right to choose one's field of private employment" but mere interruption of a right to engage in a calling is insufficient to support a substantive due process claim. *Conn v. Gabbert,* 526 U.S. 286, 291–92 (1999). [However,] [w]here the[re] [is] . . . a ***complete bar*** to the pursuit of an occupation, a person's liberty interest in pursuing such occupation is sufficiently impacted to support a claim under the Substantive Due Process Clause. *Dittman v. State of California,* 191 F.3d 1020, 1029 (9th Cir.1999).

(Emphasis added.)

Thus here, the wrongful denial of Plaintiffs' license applications—operating as it does as such a complete bar upon their right to engage in a lawful occupation of their choosing also constitutes a deprivation of liberty under color of state law in violation of Plaintiffs' substantive due process rights.

C.

The Regulation Textually Permits The Arbitrary And Capricious Deprivation Of A Qualified And Prevailing, Properly-Ranked Applicant's Property And Liberty Interests In Conditional Licensure In Derogation Of Such An Applicant's Statutory Entitlement Thereto Under The Provisions Of NRS 453D.200 And NRS 453D.210 And The Fundamental Constitutional Right To Pursue A Lawful Occupation, And Therefore In Violation Of An Applicant's Right To The Equal Protection Of The Law Guaranteed By The Fourteenth Amendment To The Constitution Of The United States And Article 1, Sections 1 And 8 Of The Constitution Of The State Of Nevada.

By improperly denying their applications for conditional licensure notwithstanding the mandatory provisions of NRS 453D.200.2 and NRS 453D.210.4-6, while improperly granting the applications of other applicants under color of state law despite them, the Department has, without justification, disparately treated Plaintiffs' applications absent rational basis, and has thereby violated Plaintiffs' rights to equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 1 of the Constitution of the State of Nevada.

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Indeed, as the court explained in *Grabhorn, Inc. v. Metropolitan Service District,* 624 F.Supp.2d 1280, 1290 (D. Oregon 2009):

> The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The equal protection guarantee protects not only groups, but ***individuals*** who would constitute a "***class of one***." *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Where, as here, state action does not implicate a fundamental right or a suspect classification, ***the plaintiff can establish a "class of one" equal protection claim by demonstrating that it has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."*** *Village of Willowbrook,* 528 U.S. at 564, 120 S.Ct. 1073. Where an equal protection claim is based on selective enforcement of valid laws, ***a plaintiff can show that the defendants' rational basis for selectively enforcing the law is a pretext for an impermissible motive***.
>
> ....
>
> Disparate government treatment will survive rational basis scrutiny as long as it bears a rational relation to a legitimate state interest. Although selective enforcement of valid laws, without more, does not make the defendants' action irrational, ***there is no rational basis for state action that is malicious, irrational or plainly arbitrary***.

(Emphasis added.) (Quoting *Squaw Valley Development Co. v. Goldberg,* 375 F.3d 936, 944 (9th Cir.2004), *abrogation on other grounds noted by Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.,* 509 F.3d 1020, 1025–26 (9th Cir.2007).

Here there is no rational basis supporting the disparate treatment to which Plaintiffs' have been subjected by the selective denial of licensure as a result of the either the Department's arbitrary and capricious promulgation of the provisions of the Regulation or its arbitrary and capricious application of them in the ways and manners set forth *supra*, in derogation of the limited discretion conferred upon the Department by the governing statutes, or as a result of otherwise-motivated irrational, actual bias, animus or caprice, as discussed *infra*. And therefore, Plaintiffs have been denied the equal protection of the law.

II.

ON INFORMATION AND BELIEF, THE DENIAL OF PLAINTIFFS' APPLICATIONS FOR LICENSURE BY THE DEPARTMENT WAS IN FACT AFFECTED BY ACTUAL ARBITRARY AND CAPRICIOUS DECISION-MAKING; AND THE LICENSING PROCESS WAS THEREBY RENDERED UNCONSTITUTIONAL IN ITS APPLICATION AS TO PLAINTIFFS.

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As the Ninth Circuit explained in *Stivers v. Pierce*, 71 F.3d 732, 741-747 (9th Cir. 1995) a genuine issue of fact obtained as to whether a board member who owned a private security and investigation firm was biased against the plaintiff and therefore denied his application for a license as a private investigator, private patrolman and process server; and that the adjudicator's pecuniary personal interest in the outcome of the proceedings created the appearance of partiality in violation of due process without any showing of *actual* bias and even absent evidence that the vote of a biased member of a multi-person tribunal was decisive or that his views influenced those of other members.

Here, on information and belief, Plaintiffs allege that pursuant to the implementation of the foregoing constitutionally-repugnant licensing process, the denial of their applications for licensure, were in fact affected by actual arbitrary and capricious decision-making; and therefore, that the licensing application process was thereby been rendered unconstitutional in its application as to them as well.

III.

THE DEPARTMENT'S IMPROPER REFUSAL TO ISSUE CONDITIONAL LICENSURE TO PLAINTIFFS IN ACCORDANCE WITH LEGISLATIVE MANDATE HAS UNREASONABLY INTERFERED WITH PLAINTIFFS' BUSINESS INTERESTS AND HAS THEREBY CAUSED AND CONTINUES TO CAUSE IRREPARABLE HARM TO PLAINTIFFS FOR WHICH PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW.

Plaintiffs are entitled to injunctive relief in this case because the Department's refusal to issue conditional licensure to Plaintiffs on an improper basis has unreasonably interfered with Plaintiffs' business interests and has thereby caused and continues to cause them irreparable harm.

Indeed, a required government-issued license to operate a particular type of business enterprise confers a *unique right* upon the recipient entitled thereto. And as our Supreme Court held in *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1030 (1987), deprivation of a *unique right* "generally results in irreparable harm."

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Thus, as the Nevada Supreme held in *State, Dep't of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. 362, 370, 294 P.3d 1223, 1228 (2012):

> We have determined that "acts committed without just cause which ***unreasonably interfere with a business*** or destroy its credit or profits, may do an ***irreparable injury***." *Sobol v. Capital Management,* 102 Nev. 444, 446, 726 P.2d 335, 337 (1986); *see also Com. v. Yameen,* 401 Mass. 331, 516 N.E.2d 1149, 1151 (1987) ("A licensee whose license has been revoked or suspended immediately suffers the ***irreparable penalty*** of loss of [license] ***for which there is no practical compensation***." (alteration in original) (internal quotations omitted)).
>
> Here, the district court found that . . . . if such an instance occurred, NAS ***would be unable to conduct any business during that time . . . . The district court properly determined that the inability to conduct any business would cause irreparable harm***. *Sobol,* 102 Nev. at 446, 726 P.2d at 337. It was within the district court's discretion to find that NAS would suffer irreparable harm because it was threatened with the prospect of losing its license to conduct business. Therefore, NAS sustained its burden, under NRS 33.010, to prove that it had a reasonable likelihood of success on the merits and that it would suffer irreparable harm for which compensatory damages would not suffice. Consequently, we determine that the district court did not abuse its discretion in granting NAS's request for injunctive relief, and we therefore affirm its order.

(Emphasis added.)

It is axiomatic that this logic and analysis applies with equal force where, as in this case, an applicant is denied issuance of a license to do business without just cause or in violation of constitutional protections. Thus, "[i]rreparable harm is an injury 'for which compensatory damage is an inadequate remedy.'" *Excellence Community Management, LLC v. Gilmore, et al.,* 131 Nev. Ad. Op. 38, 351 P.3d 720 (2015) (quoting *Dixon*, 103 Nev. at 415, 742 P.2d at 1029). And as our Supreme Court explained in *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124–25 (2013): "As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, ***by itself***, be sufficient to constitute irreparable harm" (citing *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir.1997) (emphasis added).

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IV.

THE DEPARTMENT WILL SUFFER NO HARM BY FOLLOWING THE REQUIREMENTS OF LEGISLATIVE MANDATE IN PROPERLY ADMINISTERING THE REGULATION OF THE LICENSING APPLICATION PROCESS.

It is axiomatic that the Department will suffer no cognizable prejudice by being required to follow legislative mandate in accordance with constitutional imperatives and protections. Indeed, there is no legitimate argument to the contrary whatsoever.

V.

THE PUBLIC INTEREST IS CONSISTENT WITH PLAINTIFFS' INTERESTS IN THE PROPER ADMINISTRATION OF A TRANSPARENT, IMPARTIAL AND OBJECTIVE LICENSING PROCESS WHICH IS APPLIED WITH INTEGRITY IN ACCORDANCE WITH LEGISLATIVE MANDATE AND CONSTITUTIONAL PROTECTIONS.

As the Nevada Supreme Court pointed out in *Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 66, 156 P.3d 21, 24 (2007): "Public policy . . . supports th[e] conclusion . . . . [that] [*inter alia*] [t]he purpose of [an impartial competitive] bidding [requirement] is to. . . guard against 'favoritism, improvidence and corruption'" (quoting *Gulf Oil Corp. v. Clark County,* 94 Nev. 116, 118, 575 P.2d 1332, 1333 (1978), all of which are clearly values which are consistent with the public interest in all respects.

VI.

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

For the reasons set forth *supra*, Plaintiffs are likely to succeed on the merits of their lawsuit. And accordingly, they should be granted the preliminary injunctive relief herein requested.

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5.

CONCLUSION

WHEREFORE, for all the foregoing reasons Plaintiffs respectfully pray that the Court grant the preliminary injunctive relief herein requested, together with such other and further relief as the Court deems fair and just in the premises.

DATED this 18 day of March, 2019.

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