IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SACRED GARDEN, INC.,

Protestant-Respondent,

vs. **S-1-SC-38164**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Respondent-Petitioner.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PROTESTANT-RESPONDENT SACRED GARDEN, INC., BY NEW MEXICO TOP ORGANICS-ULTRA HEALTH, INC.

Respectfully submitted,

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Amicus curiae New Mexico Top Organics-Ultra Health, Inc. requests leave, pursuant to Rule 12-320 NMRA, to file an amicus curiae brief in support of Protestant-Respondent Sacred Garden, Inc. In accordance with Rule 12-230(A) NMRA, the brief is conditionally filed with this motion. The brief begins at the conclusion of this motion.

In accordance with Rule 12-309(C) NMRA, New Mexico Top Organics-Ultra Health states that it sought the position of the parties regarding this motion. Protestant-Respondent Sacred Garden opposes this motion. Respondent-Petitioner New Mexico Department of Taxation and Revenue opposes this motion.

In accordance with Rule 12-320(D)(1), New Mexico Top Organics-Ultra Health states that it provided notice to the parties of its intention to file this motion and an amicus brief at least fourteen days prior to the due date of this motion and brief.

I. Interest of Prospective Amicus Curiae

Amicus New Mexico Top Organics-Ultra Health, Inc. is, like Protestant-Respondent Sacred Garden, a licensed medical cannabis producer. New Mexico Top Organics-Ultra Health (hereinafter "Ultra Health") is one of thirty-three entities licensed by the New Mexico Department of Health ("DOH") to produce, possess, distribute, and dispense medical cannabis.

For several years, Ultra Health has undertaken challenging litigation with the goal of expanding patient access to medical cannabis. Ultra Health is, frankly, nothing without the patients that it serves. If not for the thousands of New Mexicans who depend on medical cannabis, Ultra Health would not exist. For that simple reason, Ultra Health recognizes that when patients flourish, Ultra Health flourishes.

Gross receipts taxes are a small but real barrier to patients obtaining the quantity and quality of cannabis they need to flourish. Medical cannabis is not covered by any health insurance or any governmental benefit program, and many medical cannabis patients live on extremely limited incomes. The money paid in gross receipts taxes can make a noticeable difference in medical cannabis patients' lives. Because Ultra Health wants to see every medical cannabis patient flourish, it wishes to appear in this case as *amicus curiae.*

In 2016, Ultra Health joined with a qualified patient family to bring a lawsuit challenging a DOH regulation that limited producers to cultivation of 450 cannabis plants. *See* D-101-2016-01971. After an exhaustive trial, the case resulted in a landmark ruling recognizing that patients have a right to an adequate and beneficial supply of medical cannabis. The ruling also found that 450 plants-per-producer was inadequate to meet the needs of patients and bore no relationship to science or data. The ruling ordered the DOH to raise the plant limit.

In 2018, Ultra Health challenged, via a mandamus action, a DOH policy that limited the number of dispensaries that licensed producers could operate. *See* D-1329-CV-2018-01854. At the time, Ultra Health was endeavoring to build dispensaries in rural areas, but DOH's policy prevented Ultra Health from opening dispensaries in places like Espanola and Alamogordo. Ultra Health prevailed in that action and obtained a ruling stating that DOH could not limit the number of locations a producer operated. Ultra Health now has 25 dispensary locations, including in rural locations such as Clayton, Silver City, Hobbs, and Gallup.

In 2018, Ultra Health brought a federal lawsuit regarding its First Amendment rights to educate the public about medical cannabis. *See* 1:17-cv-00599-JAP-LF, District of New Mexico. The State Fair of New Mexico had restricted Ultra Health's display at the State Fair, barring Ultra Health from showing pictures of cannabis and effectively prohibiting much of Ultra Health's educational material. After a trial, the federal court ruled in Ultra Health's favor, finding that the State Fair of New Mexico had violated Ultra Health's First Amendment rights to speak about medical cannabis.

In 2019, Ultra Health supported a mandamus action by three individuals challenging DOH's limitations on the ability of out-of-state residents to participate in the New Mexico medical cannabis program. *See* D-101-CV-2019-01967. Again, the court ruled in the patients' favor, holding that DOH had acted contrary to the

Lynn and Erin Compassionate Use Act ("LECUA"). *See* NMSA 1978, §§ 26-2B-1 to -7 (2007, as amended through 2019).

In a separate case in 2020, D-101-CV-2020-2059, Ultra Health brought another mandamus action challenging DOH's limitations on reciprocal participation in New Mexico's medical cannabis program. Again, the court ruled that DOH had acted contrary to the Lynn and Erin Compassionate Use Act.

In 2020, Ultra Health also appealed a set of regulations promulgated by DOH that would have made medical cannabis more expensive for patients to buy and more difficult for producers to produce. *See* D-101-CV-2020-01485. The court agreed with Ultra Health and struck DOH's onerous regulations as contrary to law and lacking in substantial evidence.

In 2021, Ultra Health revived D-101-2016-01971, once again arguing that DOH's current plant count could not meet the needs of the more than one hundred thousand New Mexicans enrolled in the Medical Cannabis Program.

Ultra Health has, like Sacred Garden, requested tax refunds on gross receipts taxes paid on medical cannabis. Ultra Health did bring one lawsuit regarding the Taxation and Revenue Department's denial of its refund request, D-101-CV-2019-00137, but the Court of Appeals released its decision in *Sacred Garden*, A-1-CA-37142, during the pendency of the District Court proceedings. Ultra Health's case did not reach a final decision in the District Court. Rather, given the uncertainty of

the Supreme Court's position and whether the Supreme Court would grant certiorari, the District Court stayed the case pending the Supreme Court's final say on the matter.

This record shows that Ultra Health has tirelessly worked to expand access to medical cannabis, affirm and acknowledge patient rights to medical cannabis, destigmatize the use and sale of medical cannabis, and ensure that the medical cannabis regulators in New Mexico always comply with the law.

Through its many court cases and administrative hearings, Ultra Health has developed a body of knowledge of cannabis-related law that is second-to-none. Ultra Health wishes to share this body of knowledge with the Supreme Court via an amicus brief. In a larger sense, Ultra Health's interest in submitting an amicus brief is the interest it has shown in every single one of its previous litigations: to prove, through thoughtful and honest legal analysis, that medical cannabis is a legitimate medical treatment and should be treated exactly like any other medical treatment.

II. The Brief Will Assist the Court.

Ultra Health's brief will assist the Supreme Court by placing the present controversy in the proper context of the LECUA. As indicated above, Ultra Health has litigated the borders and boundaries of LECUA more than any other entity. As such, Ultra Health can contextualize a *tax* case within the medical cannabis

framework. Ultra Health's approach, which centers on LECUA, will help the Supreme Court understand the case to a depth that a purely tax-centered perspective may not. Ultra Health's approach will explain the entire structure of the medical cannabis regime in New Mexico, which will allow the Supreme Court to understand that medical cannabis is treated as prescription within this structure.

Particularly, Ultra Health can explain to the Supreme Court how medical cannabis statutes and regulations work on a day-to-day basis in New Mexico, and this showing will allow the Supreme Court to orient itself to the questions of who, where, when, why, and how. In contrast, a purely tax-focused perspective cannot offer all of these orientations; it can only examine the "what" question.

The record developed in the parties' case below is more limited, because the case originated in an administrative protest within the Taxation and Revenue Department. Ultra Health can provide a broader picture and a deeper context of the entire medical cannabis system, from A to Z, to help the Court contextualize this tax question within the overall medical cannabis framework.

Ultra Health's amicus brief guides the Court through the entire medical cannabis program and the statutory/regulatory regime carefully crafted by the legislative and executive branches of New Mexico's government. This guided tour of medical cannabis in New Mexico will provide the necessary context for the

Court to see that the law treats medical cannabis as a prescription drug at every step of the process.

Ultra Health's brief will also assist the Court in understanding the current impact of federal law. Ultra Health has confronted the issue of federal law in most of its previous litigation cases, and therefore has the body of knowledge to inform the Court on this matter.

Ultra Health's brief will also assist the Court with understanding how recent legislative changes affect the outcome of the present case. Again, Ultra Health's deep and broad knowledge of cannabis-related litigation and legislation can put the circumstances in proper context.

III. Conclusion

Ultra Health is delighted to share its experience in and knowledge of the medical cannabis system in New Mexico with the Supreme Court.

WHEREFORE, amicus curiae New Mexico Top Organics-Ultra Health requests leave to file an amicus curiae brief.

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of June 2021, a copy of the foregoing was submitted through the Court's efile and serve system and served via email to counsel for all parties.

/s/ *Kristina Caffrey*
Kristina Caffrey

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NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Respondent-Petitioner.

***AMICUS CURIAE* BRIEF OF NEW MEXICO TOP ORGANICS-ULTRA HEALTH, INC., IN SUPPORT OF PROTESTANT-RESPONDENT SACRED GARDEN, INC.**

Respectfully submitted,

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STATEMENT OF COMPLIANCE

In accordance with Rule 12-318(A)(1)(c) NMRA, Amicus Curiae certifies that this Brief complies with the limitations of Rule 12-318(F)(3) NMRA. This Brief has been prepared using Times New Roman font and contains 9,060 words in the body of the brief, as obtained from Microsoft Word Version 16.43.

This case presents the New Mexico Supreme Court with the prospect of taking a giant leap for over one hundred thousand New Mexicans, using only a few small steps of basic statutory analysis. The New Mexico Court of Appeals, the New Mexico Legislature, dozens of New Mexican businesses, thousands of medical professionals, and 116,000 New Mexicans have already recognized the legitimacy of cannabis as a medical treatment, and with this case, the highest court in the state can, and *should*, join them.

The issue presented by this case is simple: is medical cannabis eligible for the gross receipts tax deduction New Mexico already provides for "prescription drugs?" The answer is, unequivocally, yes.

I. The Taxation and Revenue Department's Terminology Is Inaccurate.

Before Amicus[1] New Mexico Top Organics-Ultra Health, Inc.[2] dives into the merits of this case, it must make a small, but important, point regarding terminology. The brief filed by the New Mexico Taxation and Revenue

[1] In accordance with Rule 12-230(C) NMRA, Amicus New Mexico Top Organics-Ultra Health states that counsel for the parties did not author any of this brief. Neither counsel for the parties nor the parties themselves made any monetary contribution to the preparation or submission of this brief. This brief was prepared by New Mexico Top Organics-Ultra Health's internal counsel. New Mexico Top Organics-Ultra Health, Inc. monetarily contributed to the preparation and submission of this brief.

[2] In accordance with Rule 12-320(D)(1) NMRA, Amicus Ultra Health states that it provided notice to the parties of its intention to file an amicus brief at least fourteen days prior to the due date of this motion and brief.

Department ("TRD") repeatedly uses the word "marijuana" to refer to a substance that is referred to in *statute* as cannabis. BIC at 1-4, 6-9, 13-20. The Supreme Court must realize that the Legislature, by choosing the word "cannabis," intended to emphasize its assessment that cannabis is a legitimate medical treatment modality.

The Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 to -7 (2007, as amended through 2020) ("LECUA"), explicitly uses the term "cannabis" in all its sections and subsections. Section 26-2B-3(B) specifically defines "cannabis" as "all parts of the plant Cannabis sativa L. containing a delta-9-tetrahydrocannabinol concentration of more than three-tenths percent on a dry weight basis." LECUA thus uses the scientific name for the cannabis plant derived from Linnaean taxonomy—the word "cannabis" refers to the genus and the word "sativa" refers to the species—and defines it by reference to the chemical composition of the plant.

The fact that LECUA uses the scientific, biological name for the substance, and the fact that LECUA defines cannabis in relation to a particular chemical composition, both indicate the seriousness with which the Legislature intended to treat medical cannabis. The Legislature did not simply throw around outdated, pejorative slang—it approached the topic with a scientific sensitivity appropriate to a *medical* paradigm.

In contrast, the term "marijuana" has a dubious origin that may have nothing at all to do with scientific, biological taxonomy. In an article exploring the origins and connotations of the term "marijuana," https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana, NPR notes that while the history of the term is mysterious, the word "came into popular usage in the U.S. in the early 20th century because anti-cannabis factions wanted to underscore the drug's 'Mexican-ness.' It was meant to play off of anti-immigrant sentiments."

The actual etymology of "marijuana" is less important than the fact that LECUA deliberately chose to use the more exact and more scientific term "cannabis." TRD, however, does not adopt the very careful language of the statute and chooses to use the term "marijuana." The very fact that TRD does not use the term "cannabis" indicates TRD has not carefully read the LECUA statute, and that is cause for concern, in and of itself. When TRD uses the word "marijuana" it is disregarding the intent and authority of LECUA, and thus the Legislature.

II. Ultra Health's Interest and Medical Cannabis in New Mexico.

Amicus New Mexico Top Organics-Ultra Health, Inc. is, like Protestant-Respondent Sacred Garden, a licensed medical cannabis producer. New Mexico Top Organics-Ultra Health (hereinafter "Ultra Health") is one of thirty-three entities licensed by the New Mexico Department of Health to produce, possess,

distribute, and dispense medical cannabis. Ultra Health operates a cultivation facility in Bernalillo, New Mexico, where it grows its cannabis plants. Ultra Health's state-of-the-art cultivation facility covers almost 100,000 square feet and incorporates variable light exposure mechanisms, drip irrigation systems, air ventilation systems, and humidity controls. Ultra Health actually filters the water used on the cannabis plants—which comes from Bernalillo's municipal water supply—so that the plants receive the cleanest water possible. Once the cannabis flowers are harvested and cured, Ultra Health sends the cannabis products to testing laboratories that test for potency and for the presence of contaminants.

After testing, Ultra Health distributes its cannabis products to qualified patients through its network of twenty-five (25) dispensaries within New Mexico. Ultra Health operates medical cannabis dispensaries both in urban centers like Albuquerque, Santa Fe, and Las Cruces and in a significant number of rural communities in all corners of New Mexico, including in Clayton, Hobbs, Silver City, Farmington, Clovis, Alamogordo, and Sunland Park. Ultra Health also maintains a wholesale network in which it buys cannabis wholesale from other licensed producers and sells the products through its stores.

Each Ultra Health medical cannabis dispensary is staffed by trained employees who assist medical cannabis patients in selecting cannabis products in a safe, clean, and informed environment. Ultra Health also provides pick-up service

of telephone orders, courier service to patients who cannot physically travel to a dispensary, and drive-up services for patients who do not wish to exit their vehicle at the dispensary.

When a qualified patient wishes to purchase cannabis at an Ultra Health dispensary, the qualified patient must first present his or her registry identification card. As will be explained further below, this card is issued by the Department of Health ("DOH") and authorizes the patient to purchase medical cannabis. The qualified patient makes his or her selection from the stock of cannabis products in the dispensary. All cannabis products are labeled in accordance with regulation. Once the qualified patient has made his or her selection, the qualified patient pays for the product at the cash register. Dispensary employees enter the patient's identification card number into a database system called BioTrack. DOH requires all medical cannabis dispensaries in New Mexico to use BioTrack, and the database is accessible to DOH. Dispensary employees also enter the amount of cannabis purchased into BioTrack. BioTrack thus records who buys cannabis and how much cannabis each patient purchases.

One aspect of the purchase and use of medical cannabis that surprises newcomers to this topic is that medical cannabis patients pay directly for their medicine. No commercial or governmental health insurer in New Mexico covers

medical cannabis.[3] Many medical cannabis patients in New Mexico live on very modest and/or fixed incomes; obviously, the fact that patients suffer from debilitating medical conditions means that many are unable to work or can work only part-time, and many rely on Social Security or veterans' benefits. Because patients pay cash for their medical cannabis, and because many have very modest incomes, the amount of gross receipts tax charged on medical cannabis can have a very real impact on the quantity of cannabis that a patient can purchase.

Even though patients must pay directly for medical cannabis, sales statistics indicate that patients find the cost to be justified for the benefit they receive. In 2020, Ultra Health alone sold 1,816,694 grams (1,817 kilograms) of cannabis. Those sales totaled $39,522,044. In an abundance of caution and knowing of TRD's refusal to acknowledge that a gross receipts tax deduction applied, Ultra Health did pay gross receipts tax on those sales, for a total of $2,670,817. Sales increased dramatically in 2020 compared to 2019, when Ultra Health sold 790,884 grams of cannabis for $19,750,988 and paid gross receipts taxes of $1,363,407.

The reason for the increase from 2019 to 2020 is mostly explained by the growing awareness of the benefits, and need for, medical cannabis. One of DOH's primary responsibilities in administering the Medical Cannabis Program is to

[3] New Mexico appellate courts have ruled that workers' compensation insurance must reimburse injured workers for medical cannabis. *See Vialpando v. Ben's Auto Serv.*, 2014-NMCA-084, ¶ 1.

collect data regarding patient enrollment. The Medical Cannabis Program publishes regular reports on the number of people in New Mexico who have enrolled in the Program as "qualified patients," and those reports are publicly accessible at https://www.nmhealth.org/publication/report/159/.

Statewide, the number of qualified patients has grown steadily as more and more New Mexicans discover that cannabis can be an efficacious treatment modality. For example, in December 2018, the population of qualified patients numbered 67,574. By May 2021, the population had exploded to more than 116,000.

Additionally, the state's licensed cannabis producers submit quarterly sales figures to DOH. Those reports may be obtained via the Inspection of Public Records Act and compiled in order to gauge the overall size of the medical cannabis market. Amicus Ultra Health regularly performs that compilation task. Ultra Health has found that combined medical cannabis patient sales in the first six months of 2020 totaled $92 million. In the third quarter of 2020—a three-month period—combined sales totaled $55 million, which represents the sale of 8,565 pounds of cannabis flower.

As the Supreme Court can glean from these figures, the issue at hand—whether or not medical cannabis sales are subject to gross receipts tax—affects

thousands and thousands of New Mexicans across the entire state and affects a market worth at least $200 million per year.

Although these facts and figures paint a useful background picture for the Supreme Court's evaluation of this case, none of the facts or figures is essential to deciding the issue at hand. The Supreme Court must simply do what the Court of Appeals did and did correctly: read the statutes.

III. Statutory Analysis Indicates Medical Cannabis is a Prescription Drug.

A straightforward, plain language statutory analysis of two statutes indicates that medical cannabis is a prescription drug. Particularly, the statutorily dictated *process* established in LECUA through which patients access medical cannabis indicates that the Legislature intended to treat medical cannabis as a prescription drug. In short, medical cannabis in New Mexico follows the same *prescription process* that the gross receipts tax deduction statute describes. This process is what qualifies cannabis as a prescription drug as defined in NMSA 1978, Section 7-9-73.2 (2007).

At this point, Ultra Health will analyze the LECUA statute as it existed from its enactment in 2007 until the 2021 Special Session of the New Mexico Legislature. Amicus Ultra Health will address the impact of the special session action in a later section of this brief.

A. The Process of Obtaining Medical Cannabis

Amicus Ultra Health will detail the complex process by which a New Mexico qualified patient can obtain medical cannabis, and the description of this process will show, without any doubt, that the Legislature constructed a system which treats medical cannabis exactly like a prescription at each step.

LECUA's stated purpose is "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." Section 26-2B-2. The structure of LECUA exempts certain classes of individuals and entities from criminal penalties for cannabis-related activities. In particular, a "qualified patient" "shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply," and a "licensed producer shall not be subject to arrest, prosecution, or penalty, in any manner, for the production, possession, distribution, **or dispensing** of cannabis pursuant to" LECUA. Section 26-2B-4 (emphasis added). The importance of the word "dispensing" will be explained further below.

"Cannabis producer" is defined at in Section 26-2B-3(G) as "a person that is **licensed by the department** to possess, produce, **dispense**, distribute and manufacture cannabis and cannabis products and sell wholesale or by direct sale to

qualified patients and primary caregiver" (emphasis added). The importance of the word "dispense" will be explained further below.

1. Debilitating Medical Condition and Provider

Under LECUA, an individual can become a "qualified patient" if he or she "has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card issued pursuant to [LECUA]." Section 26-2B-3(V). Amicus Ultra Health will address "debilitating medical condition," "written certification," and "registry identification cards" in turn.

The particular "debilitating medical conditions" that can qualify a patient for lawful medical cannabis use are determined by a combination of statute and regulation. The Legislature initially provided a list of qualifying "debilitating medical conditions" in Section 26-2B-3(J), but Sections 26-2B-7(A)(3) and 26-2B-7(A)(4) further instruct the DOH to "identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis" and to "set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board." The "advisory board" mentioned in Section 26-2B-7(A)(4) is the Medical Advisory Board, which was created by

Section 26-2B-6 and is composed of various medical professionals. Thus, DOH can add qualifying conditions through the Medical Advisory Board. In the years since the enactment of LECUA in 2007, the list of "qualifying conditions" has grown to twenty-two conditions, which are listed at 7.34.3.7(D) NMAC.

If an individual has one of the listed "debilitating medical conditions," the individual's next step is to obtain the "written certification." The "written certification" necessary for patients to become "qualified" is defined in LECUA as "a statement in a patient's medical records or a statement signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." Sections 26-2B-3(BB) and 26-2B-7.1. "Practitioner" is defined as "a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act." Section 26-2B-3(S).

2. Registry Identification Card

LECUA next provides that DOH "shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submit[s]" "a written certification" from the medical practitioner; the name, address, date of birth of the patient and/or primary caregiver; and the name, address, and telephone number of the practitioner. Section 26-2B-7(B). The "registry identification card,"

in turn, is defined as a "document that the department issues: (1) to a qualified patient that identifies the bearer as a qualified patient and authorizes the qualified patient to use cannabis for a debilitating medical condition." Section 26-2B-3(X). Regulations require patients to present their registry identification card at a licensed medical cannabis dispensary in order to purchase cannabis. *See* 7.34.4.22(J) NMAC. Dispensary staff must also check the registry identification card and photographic identification of the patient and record the purchaser's name and how much cannabis the purchaser bought. *See id.* ("A licensed non-profit producer shall retain clear, legible photocopies or electronic copies of current registry identification cards and current New Mexico photo identification cards of all qualified patients and primary caregivers served by the non-profit entity," and a "licensed non-profit producer shall also create and retain materials that document every instance in which usable cannabis was sold or otherwise distributed to another person or entity, including documentation of the recipient, type, quantity, and batch of the usable cannabis.").

To sum up the structure of LECUA: 1) the Legislature, DOH, and the Medical Advisory Board decide which debilitating medical conditions can qualify an individual for lawful medical use of cannabis; 2) if an individual has one of those conditions, he or she goes to a "person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act;" 3) the

person "licensed in New Mexico to prescribe and administer drugs" creates a "written certification;" 4) the individual sends the written certification to DOH; 5) DOH issues the registry identification card; 6) the patient with the registry identification card goes to a licensed dispensary operated by a licensed producer; 7) the patient purchases cannabis; and 8) the dispensary records the sale in a database.

3. Written Certifications

The "written certification" deserves more attention in this process. DOH has actually created and published a specific form for the "written certification." That form may be accessed on DOH's website, at https://www.nmhealth.org/publication/form/195/ ("New and Returning Medical Cannabis Patient Application") (Last accessed June 4, 2021). The form is also included as part of the record in case D-101-CV-2019-00137. *See* D-101-CV-2019-00137, Plaintiff's Motion for Summary Judgment, Exhibit 1, filed May 20, 2019.

The Medical Cannabis Program "written certification" contains a section to be completed by a medical provider, and it clearly states, "This form to be completed by the Medical Provider and signed by both the Medical Provider and Patient." *Id.* The medical provider must fill in the patient's name, date of birth, address, and telephone number. *See id.* The medical provider must check which

"qualifying condition" the patient has. *See id.* The medical provider must then enter his or her own name, address, telephone number, email, and most importantly, *his or her New Mexico Controlled Substance License Number*. *See id.* The medical provider must then sign the form, and the signature certifies that the provider has examined the patient, that the patient has the debilitating medical condition, and that the provider "believe[s] the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the qualified patient." *Id.*

The previous version of the form, which was entered into the record in case D-101-CV-2019-00137, required the medical provider to enter his or her name, New Mexico medical license number, Drug Enforcement Administration license number, New Mexico Controlled Substance License number, and certifying signature. *See* D-101-CV-2019-00137, Plaintiff's Motion for Summary Judgment, Exhibit 1, filed May 20, 2019.

If the patient and medical provider do not wish to use DOH's own form, DOH regulations describe what information an alternative "written certification" must contain. 7.34.3.10(C) NMAC lists the "following information [that] shall be provided in (or as an attachment to) the participant enrollment form submitted to the department in order for a registry identification card to be obtained and processed." There are fourteen discrete items listed, including "practitioner's

clinical licensure," "patient applicant's name and date of birth," "medical justification for the practitioner's certification," "practitioner's signature and the date," a "legible photocopy of the applicant's New Mexico driver's license or comparable" identification, and a "signed consent for release of medical information." 7.34.3.10(C) NMAC

If the DOH-published form resembles the prescription form for any other drug, that is because the process by which a patient obtains lawful medical cannabis is the same as the process by which a patient obtains any other lawful prescription drug. The process of a patient visiting a doctor, obtaining an exam, obtaining a diagnosis, receiving a written order, and presenting authorization at the point of purchase are the exact same gatekeeping steps a patient must pass through for other prescriptions.

4. The Packaging and Selling of Medical Cannabis

While qualified patients traverse this statutory and regulatory odyssey, the medical cannabis *itself* undertakes a difficult journey of its own. Medical cannabis producers must obtain and maintain a license from DOH, and to obtain and maintain that license, they must submit to an exhaustive review process. *See* 7.34.4.8 NMAC. Once licensed, producers must comply with standards for the production of cannabis, primarily related to the hygiene and cleanliness of the cultivation environment. *See* 7.34.4.9 NMAC. Producers must test representative

samples of all harvested cannabis, and only licensed testing laboratories can perform those tests. *See* Sections 26-2B-7(A)(7) and 26-2B-3(I). 7.34.4.10 NMAC describes the testing regimes; laboratories must test the cannabis samples for contaminants such as mold and toxins, and for each contaminant there is a corresponding "action level." If a batch of cannabis passes all mandated tests, the licensed producer can package it and sell it. Section 26-2B-7(A)(7) of LECUA, however, directs that labeling must be regulated and must satisfy DOH standards. 7.34.4.16 NMAC mandates which information must be included on a cannabis label. The rule also requires that dispensaries give patients an accompanying "drug information sheet," which contains the batch number, concentration of cannabinoids, "best by" date, instructions for storage, non-cannabis product ingredients, and allergy warnings.

5. Conclusion

All of this statutory and regulatory background is crucial for the Supreme Court to understand because all of these components are indicia of a prescription drug. The medical provider's signature on a form, the entry of a medical provider's Controlled Substances license number on the form, the entry of the patient's name and address in the form, the verification of the registry identification card at the dispensary, the recording of how much cannabis the patient purchased, the verification of diagnoses, the testing of the product, the labeling of the product, the

standards for production, the drug information sheet that must be provided to patients—all of these things indicate that medical cannabis is the same as any other prescription drug. The process of cultivating, processing, testing, and labelling medical cannabis is tightly regulated to a highly professional standard, and the process of obtaining medical cannabis is also tightly regulated to a highly professional standard. For a patient, the process of obtaining medical cannabis is equivalent to the process of obtaining any other prescription drug.

The complex structure of LECUA and its attendant regulations clearly show that the Legislature intended to treat cannabis as a prescription drug. The Legislature constructed a Medical Cannabis Program that incorporates the same features of traditional pharmaceutical systems: licensed producers, testing, labelling, medical certifications, tracking and recording of purchasers, etc. If the Legislature did not intend to treat cannabis as a prescription drug, it would not have built such a robust, professionalized Medical Cannabis Program.

TRD's brief argues that tax deductions and exemptions must be "clearly and unambiguously expressed," but TRD ignores the plethora of clear and unambiguous provisions in LECUA and its attendant regulations that treat medical cannabis exactly like any other prescription. BIC at 2, 8, 10, 22. When all the indicia of a prescription drug structure are added together—the certification form, the testing of the product, the labeling, the drug information sheet, the entry of the

medical provider's controlled substances identification number, the diagnosis and medical examination, the proof of registry authorization card, the tracking of purchases, etc.—the sum of the parts is clear and unambiguous evidence of intent to treat medical cannabis as a prescription.

Finally, one other aspect of LECUA indicates broad intent to construct a prescription-drug model for medical cannabis. Section 26-2B-4 exempts qualified patients from "arrest, prosecution or penalty in any manner" for the possession or purchase of "not more than an adequate supply" of cannabis. Section 26-2B-3(A) defines "adequate supply" as "an amount of cannabis…that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months." This provision ensures that a qualified patient can make one visit to a dispensary and purchase a three-month supply of cannabis. This purposefully evokes patients going to a pharmacy and collecting a three-month supply of any other drug. Thus, even the schedules and timelines built into LECUA call to mind prescription drug customs.

Furthermore, all of these components go toward satisfying the particularized requirements of the prescription drug deduction provided in NMSA 1978, Section 7-9-73.2 (2007).

B. The Components of the Prescription Drug Deduction

New Mexico's gross receipts tax deduction for prescription drugs is not

constructed in terms of *what* the particular substance is. Rather, the deduction describes a process—the same process, as outlined above, that applies to medical cannabis.

Section 7-9-73.2(A) states, "[r]eceipts from the sale of prescription drugs and oxygen and oxygen services provided by a licensed medicare durable medical equipment provider may be deducted from gross receipts and governmental gross receipts." Section 7-9-73.2(B) goes on to define "prescription drugs" as

> substances that are: (1) dispensed by or under the supervision of a licensed pharmacist or by a physician **or other person authorized under state law to do so**; (2) prescribed for a specified person by a person authorized under state law to prescribe the substance; and (3) subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353.

(Emphasis added).

The medical cannabis products dispensed by licensed producers at licensed dispensaries meet all of the requirements and characteristics of "prescription drugs" as defined in Section 7-9-73.2.

1. "Dispensed by or under the supervision of a licensed pharmacist or by a physician or other person authorized under state law to do so"

First, medical cannabis products dispensed by licensed "cannabis producers" **are** dispensed under the supervision of a "person authorized under state law" to do so. In fact, the word "dispense" is one of the very specific words used in LECUA to describe what licensed producers may lawfully do. LECUA specifically

authorizes licensed producers to "produce, possess, distribute and dispense" medical cannabis products to registered patients. Sections 26-2B-3(G) and 26-2B-4(G).

The list of "dispensers" in Section 7-9-73.2(B)(1) is clearly disjunctive: "by a licensed pharmacist **or** by a physician **or** other person authorized under state law to do so" (emphasis added). Licensed medical cannabis producers are clearly "persons authorized under state law" to dispense medical cannabis products, because Section 26-2B-3(G) of LECUA defines a cannabis producer as someone "**licensed by the department to** possess, produce, **dispense,** distribute and manufacture cannabis" (emphasis added).

It is not merely coincidental that both Section 7-9-73.2(B)(1) and Section 26-2B-3(G) use the word "dispense." Rather, the fact that the word "dispense" is in both statutes is clear legislative intent to tie the two statutes together. By repeatedly emphasizing that licensed cannabis producers "dispense," are licensed to "dispense," and may "dispense" without arrest, prosecution, or penalty, the Legislature indicated its intent to include licensed producers of medical cannabis within Section 7-9-73.2. *See Gutierrez v. West Las Vegas School Dist.*, 2002-NMCA-068, ¶ 15, 132 N.M. 372 ("The Legislature is presumed to know existing statutory law and to take that law into consideration when enacting new law.").

TRD's brief argues that tax deductions and exemptions must be "clearly and unambiguously" expressed. The fact that the word "dispense" appears in both the tax deduction and LECUA is a clear and unambiguous expression of a tax deduction.

Thus, medical cannabis sold by licensed producers such as Sacred Garden and Ultra Health meets the first prong of Section 7-9-73.2(B).

2. "Prescribed for a specified person by a person authorized under state law to prescribe the substance."

Next, medical cannabis is prescribed for a specified person by a person authorized under state law to prescribe the substance. The "written certification" specified in LECUA is "a statement in a patient's medical records or a statement signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." Section 26-2B-3(BB). The certification is equivalent to a prescription written by a medical practitioner licensed by prescribe and administer drugs subject to the Controlled Substances Act.

Section 7-9-73.2 does not define "prescribe," but Section 7-9-73.3(G)(4) does: "to authorize the use of an item or substance for a course of medical treatment." The New Mexico Court of Appeals correctly referred to Section 7-9-

73.3(G)(4) in its own opinion on this matter. *See Sacred Garden, Inc. v. New Mexico Taxation and Revenue Department*, 2020-NMCA-____, ¶ 10.

If the Supreme Court does not consider it appropriate to use Section 7-9-73.2's definition of "prescribe," it can use dictionary definitions. *See Griego v. Oliver*, 2014-NMSC-003, ¶ 21, 316 P.3d 865 ("Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance." (quoting *New Mexico Attorney Gen. v. New Mexico Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 26, 309 P.3d 89)). The dictionary definitions of "prescribe" conform to Section 7-9-73.3(G)(4). Merriam-Webster defines "prescribe" as "to designate or order the use of as a remedy." The Oxford Dictionary defines "prescribe" as "advise and authorize the use of a medicine or treatment for someone, especially in writing."

The Medical Cannabis Program patient application published by DOH provides the forum for a medical practitioner to advise and authorize the use of medical cannabis for a course of medical treatment. *See* https://www.nmhealth.org/publication/form/195/. As such, it has all the features and indicia of a prescription. The medical practitioner must provide his or her licensure information, address, and Controlled Substance License number. *See id.* The medical practitioner must also attest that he or she "discussed the potential risks and benefits with the patient and find[s] that potential health benefits of the

medical use of cannabis likely outweigh the health risks for the patient." *Id.* In this way, the medical practitioner absolutely "authorizes the use" of a medical treatment as contemplated by Section 7-9-73.2(B)(1). And of course, an individual cannot obtain the "registry identification card" without the medical practitioner's written certification—thus, it is the medical practitioner's action that is the essential step in authorizing the patient's lawful use of medical cannabis. Section 26-2B-3(X).

Additionally, certifications for medical cannabis are unique to specific individuals; they are not interchangeable between individuals. The patient application form, Section 26-2B-7(B) of LECUA, and the regulations at 7.34.3.10(C) NMAC all require individualized information: addresses, birth dates, and names. By requiring that the written certification and registry identification cards are individualized, LECUA ensures that medical cannabis is prescribed "for a specified person" under Section 7-9-73.2(B)(2).

Finally, medical cannabis is prescribed by individuals "authorized under state law" to "prescribe the substance." New Mexico allows only licensed medical providers to authorize cannabis use for qualified patients. This is obvious from the application forms, but also from the structure of the law. Under LECUA, certifications for medical cannabis must be made by medical practitioners who otherwise have the authority to prescribe pharmaceuticals, namely "a person

licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act." Section 26-2B-3(S). Cannabis, under its pseudonym "marijuana," is listed in the Controlled Substances Act. *See* NMSA 1978, § 30-31-6 (1972, amended through 2019).

Furthermore, Section 25-2B-4(F) of LECUA provides that a "practitioner shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege for recommending the medical use of cannabis or providing written certification for the medical use of cannabis pursuant to the Lynn and Erin Compassionate Use Act." This section of LECUA authorizes a practitioner to prescribe cannabis, because it removes any penalties that might otherwise dissuade a practitioner from prescribing cannabis. Certainly, if LECUA did not exempt practitioners from legal consequences, those practitioners may not deem themselves "authorized" to prescribe cannabis, but because LECUA does exempt practitioners from legal consequences, the practitioners are "authorized."

Finally, it is worth noting that the practitioner must be authorized "under state law" to prescribe the substance. Section 7-9-73.2(B). Because "state law" controls here, federal laws regarding cannabis are irrelevant, and the particular directives of medical associations or professional guilds are irrelevant. Medical associations may advise physicians not to become involved with medical cannabis, but their opinions do not matter here at all. All that matters is state law's position

on medical cannabis, and clearly state law authorizes medical practitioners to authorize the use of cannabis in a medical setting.

Thus, medical cannabis sold by licensed producers such as Sacred Garden and Ultra Health meets the second prong of Section 7-9-73.2(B).

3. "Subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353."

Medical cannabis is subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353. Subparagraph 1 of Subsection (b) of 21 USCA 353 states that "a drug intended for use by man" which "is limited...to use under the professional supervision of a practitioner licensed by law to administer such drug" "shall be dispensed only (1) upon a written prescription of a practitioner licensed by law to administer such drug." Thus, 21 U.S.C. 353(b)(1) states that drugs requiring a prescription for use shall only be dispensed upon a written prescription.

The structure of LECUA fits the criteria of Subparagraph 1 of Subsection (b) of 21 USCA 353. LECUA allows dispensing of medical cannabis only to those patients whose medical providers have prescribed it. LECUA thus incorporates and reiterates 21 U.S.C. 353(b)(1). Again, this is a signal of legislative intent to make medical cannabis eligible for the exact same tax treatment as conventional prescription drugs. If the organizers of LECUA did not believe medical cannabis

should be treated like any conventional prescription drug, then LECUA would not have built such a thorough and exacting process for obtaining medical cannabis.

Thus, medical cannabis sold by licensed producers such as Sacred Garden and Ultra Health meets the third prong of Section 7-9-73.2(B).

C. The Court of Appeals Was Correct.

Under an entirely straightforward, plain language, common sense analysis of the Compassionate Use Act and Section 7-9-73.2, medical cannabis is a prescription drug. Reaching this conclusion does not require any scientific data regarding the efficacy of cannabis, any public opinion polls regarding the acceptance of cannabis, or any particular dollar threshold. All it requires is basic statutory analysis and a recognition that much of LECUA appears consciously designed to describe a *prescription process*.

The Court of Appeals' opinion in this matter applied the correct approach to reach the correct result. The Court of Appeals relied on an indisputable set of core legal principles: a court's primary goal is to give effect to the intent of the Legislature, and courts discern that intent by looking to the plain meaning of the statute and reading the provisions as a harmonious whole. *See Sacred Garden, Inc.*, 2020-NMCA-_____, ¶ 5.

The Court of Appeals correctly rejected the administrative hearing officer's rationale for denying Sacred Garden's gross receipts tax refund, which was that

since LECUA does not expressly state that medical cannabis is a prescription drug, medical cannabis is not a prescription drug. *See id.* ¶ 11. The Court of Appeals correctly noted that this rationale "essentially ignores the definition of "prescribe" set forth in Section 7-9-73.3(G)(4)." *Sacred Garden, Inc.*, 2020-NMCA-_____, ¶ 11. Amicus Ultra Health argues further that the hearing officer's rationale ignores the plethora of ways in which LECUA treats medical cannabis like a prescription. Even if LECUA does not contain the word "prescription," it provides all the building blocks to construct a prescription.

TRD has simply refused to recognize medical cannabis on par with "prescribed drugs." In doing so, TRD ignores three prior opinions of the New Mexico Court of Appeals in the workers' compensation context,[4] ignores that 116,000 New Mexicans find cannabis medically efficacious, and ignores the growing body of medical practitioners who prescribe cannabis. But more importantly, TRD's position ignores the plain language of the statutes and ignores the design of LECUA and the entire Medical Cannabis Program. The Legislature of New Mexico, in designing and constructing LECUA and the Medical Cannabis Program, and DOH, in promulgating regulations according to LECUA, obviously

[4] Three Court of Appeals opinions held that the workers' compensation system must allow the use of, and must compensate workers for, medical cannabis. Those opinions are *Lewis v. American General Media*, 2015-NMCA-090; *Vialpando v. Ben's Automotive Services*, 2014-NMCA-084; *Maez v. Riley Industries*, 2015-NMCA-049.

took great care to ensure that medical cannabis is subject to the same standards as conventional medicines are. All of the indicia of prescriptions are present. Accordingly, sales of medical cannabis by licensed producers to qualified patients qualify for the gross receipts tax exemption for "prescription drugs" set out in Section 7-9-73.2.

Finally, Amicus Ultra Health notes that a federal court analyzed the process of medical cannabis prescription in New Mexico and concluded that medical cannabis is a prescription drug. In the case *Jeremy LaJeunesse v. BNSF Railway Company*, CV-18-0214, Memorandum Opinion and Order, June 24, 2019 (D.N.M. 2019), a discovery dispute arose between an employee suing his employer for negligence and the employer. The employer sent a variety of requests and releases for medical records to the employee, including a release for medical cannabis dispensary records. *Id*. at *2. The employee argued that dispensaries and the New Mexico Department of Health did not qualify as "pharmacies." The federal court concluded "at medical marijuana dispensaries and, for the purposes of this case, the New Mexico Department of Health, fall within the definition of a 'pharmacy' for the purposes of a discovery request under Rule 34." *Id*. at *5. The federal court noted that "both 'pharmacies' and medical marijuana 'producers' are heavily regulated by the State of New Mexico" and that the word "dispense" appears in both New Mexico's definition of "pharmacy" and in Section 26-2B-3 of LECUA.

Jeremy LaJeunesse, Mem. Op. at 5-6 (citing NMSA 1978, § 61-11-2 (1977) and Section 26-2B-3). The federal court reasoned that "both pharmacies and 'cannabis producers' are licensed by the State to dispense drugs pursuant to prescriptions issued by qualified medical practitioners." *Id*. at *6.

The federal court's analysis and the Court of Appeals' analysis below both properly focus on *how* medical cannabis functions—on the process by which producers produce and sell medical cannabis and the process by which qualified patients obtain medical cannabis. In contrast, TRD remains improperly focused only on *what* medical cannabis *was* under previous legal regimes: a prohibited substance. That prejudice colors its entire analysis and renders the analysis incorrect.

D. State Statute Medicalizes Cannabis In Other Instances.

The Compassionate Use Act is, of course, the primary evidence of New Mexico's intent to treat medical cannabis like any other prescription medication. However, other statutes also medical-ize cannabis—that is, treat medical cannabis as a prescription. NMSA 1978, Section 22-33-5 (2019) governs the administration of medical cannabis in public school settings, and it specifically prohibits public schools or school districts from "discipline[ing] a student who is a qualified student on the basis that the student requires medical cannabis as a reasonable accommodation necessary for the student to attend school" or "deny[ing] eligibility

to attend school to a qualified student on the basis that the qualified student requires medical cannabis as a reasonable accommodation." This statute thus places students who rely on medical cannabis on the same playing field—metaphorically and literally—as students who require other medications.

NMSA 1978, Section 24-6B-11(L) (2019) provides that an "individual's participation in the state's medical cannabis program established pursuant to the Lynn and Erin Compassionate Use Act shall not in itself constitute grounds for refusing to allow that individual to receive" an organ transplant. This provision ensures that patients who need organ transplants and use medical cannabis will be given the same consideration as patients who need organ transplants and use other medications.

Finally, NMSA 1978, Section 32A-3A-15(D) (2019), which is part of the Children's Code, states, "For the purposes of medical care, including an organ transplant, a qualified patient's use of cannabis pursuant to the Lynn and Erin Compassionate Use Act shall be considered the equivalent of the use of any other medication under the direction of a physician and shall not be considered to constitute the use of an illicit substance or otherwise disqualify a qualified patient from medical care."

IV. Federal Law Does Not Affect this Case.

The Supreme Court should rest assured that federal law, and specifically the continued illegality of cannabis under federal law, has no effect on this case. First, gross receipts taxes are an exclusively state area of control. It is true that state *income* tax laws often draw upon or refer to federal law. New Mexico's own income tax code piggybacks on federal law in numerous places by referencing Internal Revenue Code Provisions, for example, NMSA 1978, Sections 7-2-2, 7-2D-10, and 7-2A-4. However, the United States federal government does not impose a national gross receipts tax—and the United States Constitution contains no provisions authorizing the federal government to do so. Because the United States federal government does not impose a national gross receipts tax, New Mexico has no reason to base its gross receipts tax decisions on the federal government.

New Mexico's imposition of gross receipts taxes derives entirely from Article VIII, Section 1 of the New Mexico Constitution, which recognizes New Mexico's sovereign authority to levy taxes. As such, gross receipts taxes are an exclusive province of state law, and the Supreme Court need not, and should not, depend on the federal government's position toward cannabis. New Mexico is sovereign in this area of gross receipts taxes, and New Mexico can decide, as a sovereign, what it does and does not tax.

Second, the federal government cannot interfere with state-level medical cannabis programs. On February 15, 2019, a federal spending bill became law which states, "None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama…New Mexico, New York…to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *See* H.J. Res. 31, Section 537.

This provision to federal spending is merely the latest in a long line of amendments and riders attached to federal spending bills over the past few years. *See* H.R. 2029, Section 542, applicable to spending in 2016 (114th Congress, 2015-2016); H.R. 244, Section 537, applicable to spending in 2017 (115th Congress, 2017-2018); H.R. 1625, Section 538, applicable to spending in 2018 (115th Congress, 2017-2018).

Because the United States Congress has prohibited United States law enforcement from interfering with states' medical cannabis decisions, the New Mexico Supreme Court may proceed with its decision without regard to cannabis' federal illegality.

V. The 2021 Legislative Change Does Not Change the Outcome of this Case.

TRD claims that a 2021 legislative change indicates that no gross receipts tax deduction existed prior to the change, because the amendment added a specific

deduction for "cannabis products that are sold in accordance with [LECUA]." BIC at 27. TRD's analysis is incomplete and incorrect. The 2021 legislative change is clearly a curative and remedial attempt to clarify the law and harmonize statute with judicial rulings.

A. Legislative Amendments May Be Clarifications and Confirmations.

It is true that in many situations, when the legislature amends a statute, it intends to change existing law. However, there are more specialized rules when the legislature amends a statute to harmonize the statute with existing law on the topic. The "'legislature can[] amend an existing law for clarification purposes just as effectively and certainly as for purposes of change.'" *Pina v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 22, 139 N.M. 619 (alteration in original) (quoting *State ex rel. Dickson v. Aldridge*, 1960-NMSC-018, ¶ 19, 66 N.M. 390).

A "clarification occurs when, rather than amending an existing law to provide a change, a statutory provision is amended to **clarify what was previously implicit in the law**." *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 25, 149 N.M. 455 (emphasis added). "'It must be remembered that when a statute is ambiguous, amendment of the statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law.'" *Wasko v. New Mexico Dep't of Labor*, 1994-NMSC-076, ¶ 5, 118 N.M. 82 (quoting 1A Norman J. Singer, Sutherland Statutory Construction § 22.01, at 172 (5th ed. 1993)).

"It is an accepted principle of statutory construction in other states that a statute which clarifies existing law may properly be regarded as having retroactive effect." *Swink v. Fingado*, 1993-NMSC-013, ¶ 35, 115 N.M. 275. "When an amendment clarifies existing law **and where that amendment does not contravene previous constructions of the law**, the amendment may be deemed curative, remedial and retroactive." *Id*. (quoting *Tomlinson v. Clarke*, 118 Wash.2d 498, 825 P.2d 706, 713 (1992) (en banc) (emphasis added)). "Where a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time, and retroactivity is not involved." *Swink*, 1993-NMSC-013, ¶ 35 (quoting *GTE Sprint Communications Corp. v. State Bd. of Equalization*, 1 Cal.App.4th 827, 2 Cal.Rptr.2d 441, 444-45 (1991)).

In *Pina,* the Court of Appeals interpreted the Oilfield Anti-Indemnity Statute. *See Pina*, 2006-NMCA-063, ¶ 1. The Legislature amended that statute in 1999. *See id.* ¶ 14. In the district court, a controversy arose over indemnification contracts—the subject of the recently-amended Oilfield Anti-Indemnity Statute. *See id.* ¶¶ 6-7. In 2003, the Legislature amended the statute again, which provoked the question of which version of the statute applied to the case. *See id.* ¶ 16. On appeal, one of the litigants argued, "the district court correctly recognized that the 1999 version of the statute applies to the present case and the 2003 version is not retroactive, [but] the [district] court in essence gave the 2003 amendment

retroactive effect by erroneously ascribing to the 1999 statute a legislative intent that was not manifest until 2003." *Id*.

The Court of Appeals analyzed legislative intent above all else, in both versions of the statute, and concluded, "[t]he 2003 amendments merely make clearer what was already implicit in the 1999 amendments to Section 56-7-2: indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy of New Mexico and are void and unenforceable." *Pina*, 2006-NMCA-063, ¶ 22. Therefore, the 2003 statute had a kind of retroactive effect because it made explicit what had been implicit in the 1999 statute. *See id.*

Wasko v. New Mexico Dep't of Labor, 1994-NMSC-076, centered on the question of whether the 1993 amendment to unemployment compensation statutes "changed or clarified the law with respect to whether social security benefits are deductible from state unemployment compensation benefits." *Id*. ¶ 1. The Supreme Court held "that the 1993 amendment was meant to clarify the existing law rather than change the law." *Id*. ¶ 9. The 1991 version of the statute was "on its face, ambiguous about whether social security benefits are deductible from unemployment compensation benefits," and a "growing body of federal and state case law interpreted similar statutes to require the deduction of social security payments from unemployment compensation benefits," and so it was "reasonable

to conclude that the legislature intended the 1993 amendment to clarify the preexisting meaning of the statute rather than to change the law." *Id*. ¶ 10.

B. The Legislature Confirmed Existing Judicial Rulings.

Here, the 2021 amendment to Section 7-9-73.2 was curative, remedial, and retroactive. The amendment was a clarification of existing law that conformed statute to prior judicial rulings. The amendment was an effort to clarify existing law and to permanently enshrine in statute the interpretation that had already been announced by the Court of Appeals in *Sacred Garden, Inc.* that medical cannabis is a prescription drug under Section 7-9-73.2.

Crucially, the statutory amendment at issue here does not exist in a vacuum; it exists in the context of a Court of Appeals decision that stood, without action by the New Mexico Supreme Court, for over one year. The Court of Appeals announced its decision in *Sacred Garden, Inc.* on January 28, 2020. Although TRD filed a petition for writ of certiorari with the Supreme Court on March 9, 2020, the petition was not granted until April 12, 2021.

It was while the Court of Appeals' opinion reigned unreviewed that the Legislature amended Section 7-9-73.2. The Legislature passed Special Session House Bill 2 on March 31, 2021. *See* https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=2&year=21s. Thus, when the Legislature passed its amendment, the Court of

Appeals' opinion in *Sacred Garden*, *Inc.* was the "existing law" and was the "previous construction of the law." The Court of Appeals had already identified the proper construction of Section 7-9-73.2 as it relates to medical cannabis.

TRD would like to construct a simple timeline, where the period from 2007 to March 31, 2021 had no gross receipts tax deduction for medical cannabis, and on March 31, 2021, the Legislature created an entirely new gross receipts tax deduction for medical cannabis. The timeline is actually more complex: from 2007 to January 28, 2020, the gross receipts tax deduction for medical cannabis was undetermined, from January 28, 2020 to March 31, 2021, there existed a judicial ruling recognizing a gross receipts tax deduction for medical cannabis, and on March 31, 2021, the Legislature entered a formal gross receipts tax deduction into statute.

This timeline raises two possibilities for interpretation. The first possibility is that in 2021, the Legislature was aware of *Sacred Garden, Inc.* and wished to negate the Court of Appeals' opinion *by passing a law affirming the Court of Appeals opinion*, knowing that the change in the law would raise a presumption that the gross receipts tax deduction did not exist prior to the change. The second possibility is that in 2021, the Legislature knew of the Court of Appeals opinion and wished to conform statute to judicial ruling *by passing a law that is in*

harmony with the Court of Appeals opinion in order to clarify the status of the law. The second possibility makes much more sense than the first possibility.

The first possibility requires a good deal of mental gymnastics. It also requires this Court to assume that there is something inherently different about medical cannabis sold on June 28, 2021 and medical cannabis sold on June 29, 2021 (June 29, 2021 is the day that the 2021 statutory amendments become effective). TRD's argument—that the Legislature meant to change the existing law when it amended Section 7-9-73.2—implies that the nature of medical cannabis will fundamentally transform itself on the arbitrary date that a law becomes effective. TRD believes that medical cannabis sold on June 29, 2021 is tax deductible, but medical cannabis sold on June 28, 2021 should not be tax deductible. However, it is fundamentally the same in physical characteristics. The only difference is the date. The cannabis is the same, the patient is the same, the patient still has the same qualifying condition—why should the tax deduction not apply on one day versus the other day?

It makes vastly more sense to conclude that in 2021, the Legislature knew of the Court of Appeals' opinion regarding gross receipts tax deductions for medical cannabis and wished to conform the statute to the judicial ruling *because the judicial ruling was correct*. Therefore, the Legislature passed a law that is in harmony with the Court of Appeals opinion. Under this explanation, the medical

cannabis sold on June 28, 2021 is the same as the medical cannabis sold on June 29, 2021. *See Swink*, 1993-NMSC-013, ¶ 35 ("[w]hen an amendment clarifies existing law **and where that amendment does not contravene previous constructions of the law**, the amendment may be deemed curative, remedial and retroactive." (emphasis added)). The 2021 amendment to Section 7-9-73.2 does not contravene the previous judicial construction of the law—in fact, it compliments and confirms the previous judicial construction of the law, and therefore, it should be deemed curative, remedial, and retroactive.

Recall that "clarification occurs when, rather than amending an existing law to provide a change, a statutory provision is amended to **clarify what was previously implicit in the law**." *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 25 (emphasis added). The *Sacred Garden, Inc.* opinion explained and outlined the principles embedded in LECUA and in Section 7-9-73.2, and the Legislature then made that explanation explicit by amending Section 7-9-73.2. The Legislature essentially codified the Court of Appeals' reasoning—and it must be noted that during the Special Session, the Legislature did *not* know that the Supreme Court would eventually review the Court of Appeals' decision. Rather, the Legislature's action should be seen as an endorsement of the Court of Appeals' decision. The Legislature effectively said, "the Court of Appeals got it right, so we will formalize the reasoning into the statutory amendment."

Furthermore, as Amicus Ultra Health has explained thoroughly in this brief, the gross receipts tax deduction for medical cannabis has always been not only implicit in the law, but explicit. The unmistakable indicia of a prescription drug structure have always been obvious in LECUA and in its attendant regulations. The Legislature merely codified what had been hiding in plain sight—that LECUA always described and enacted a complex legal structure that manifested a prescription drug process.

In sum, the Legislature's 2021 amendment to Section 7-9-73.2 is a clarification of existing law, rather than a change. As such, this Court can—and should—comfortably hold that there *always has been* a gross receipts tax deduction for medical cannabis and that *there will continue to be* a gross receipts tax deduction for medical cannabis. There has always been a gross receipts tax deduction for medical cannabis because the structure of LECUA describes a prescription drug process that satisfies the components of Section 7-9-73.2. There will continue to be a gross receipts tax deduction for medical cannabis because the Legislature in 2021 clarified existing law to explicitly codify the deduction.

VI. Conclusion and Relief Requested

Amicus Ultra Health urges the New Mexico Supreme Court to examine the medical cannabis legal structure in New Mexico in a broader light than that which TRD uses. The legal structure of medical cannabis in New Mexico has never been

a tossed-off, throwaway jumble. It has always been a careful, complex system that allows New Mexicans to use medical cannabis in a responsible manner. Recognizing the gross receipts tax deduction for medical cannabis comports with the overall medicalized, scientific paradigm of LECUA.

Amicus Ultra Health requests the Supreme Court affirm the Court of Appeals and grant the gross receipts tax refund requested by Sacred Garden.

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of June 2021, a copy of the foregoing was submitted through the Court's efile and serve system and served via email to counsel for all parties.

/s/ *Kristina Caffrey*
Kristina Caffrey