

STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO

JASON BARKER,

Petitioner,

Case No.: D-202-CV-2021-04058

v.

NEW MEXICO DEPARTMENT OF HEALTH,  
DOMINICK ZURLO, in his official capacity as Director  
of the Medical Cannabis Program, Dr. TRACIE COLLINS,  
in her official capacity as Secretary of the Department of  
Health; and NEW MEXICO REGULATION AND LICENSING  
DEPARTMENT and LINDA TRUJILLO, in her official  
capacity as SUPERINTENDENT of the Regulation and Licensing Department;  
JOHN BLAIR, in his official capacity as DEPUTY-SUPERINTENDENT of the  
Regulation and Licensing Department; and ROBERT SACHS, in his  
official capacity as DEPUTY POLICY DIRECTOR of the CANNABIS  
CONTROL DIVISION,

Respondents.

**ALTERNATIVE WRIT OF MANDAMUS**

**To:** Hon. Dr. Tracie Collins, in her official capacity as Secretary of the New Mexico  
Department of Health  
Dr. Dominick Zurlo, in his official capacity as director of the New Mexico Medical  
Cannabis Program  
Hon. Linda Trujillo, in her official capacity as Superintendent of the New Mexico  
Regulation and Licensing Department  
Mr. John Blair, in his official capacity as the Deputy-Superintendent of the Regulation  
and Licensing department,  
Mr. Robert Sachs, in his official capacity as the Deputy Policy Director of the Cannabis  
Control Division

GREETINGS, the following is alleged by Petitioner:

1. Petitioner has petitioned this Court for an alternative writ of mandamus. The Petition is attached hereto as Exhibit A. All allegations found in the Petition that are not repeated herein are incorporated by reference.

2. Petitioner is a “person” as defined by the New Mexico Uniform Statutory Construction Act, NMSA 1978, Section 12-2(A)-3(E) (“‘person’ means an **individual**, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity”) (emphasis added).
3. Petitioner is a medical cannabis patient who is duly enrolled in New Mexico’s Cannabis Program and who possesses a valid medical cannabis registry identification card.
4. Petitioner is a “qualified patient” as that term is defined in the LECUA, NMSA 1978, Section 26-2B-3(V).
5. Petitioner’s qualifying condition is traumatic brain injury.
6. Petitioner regularly requires more than a cumulative eight-ounces of medical cannabis in a ninety-day period to treat his serious medical condition.
7. Petitioner cannot purchase the amount of medical cannabis required to treat his serious medical condition because of Respondents’ unlawful regulatory scheme. Petitioner has, therefore, suffered, and will continue to suffer harm absent a remedy from this Court.
8. When Petitioner cannot purchase an adequate supply of medical cannabis on account of Respondent’s unlawful regulatory scheme, he cannot benefit from the use of medical cannabis and must rely on friends to donate additional medical cannabis to him. The severity of Petitioner’s medical condition also requires that he purchase cannabis products with a high unit-value.<sup>1</sup> As such, Respondents’ regulatory scheme punishes Petitioner and other patients with severe medical conditions that require larger amounts of medical cannabis to manage and so exhaust their “units” more quickly.

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<sup>1</sup> 7.34.9(A) NMAC and 7.34.4.8(L) NMAC unlawfully limit the amount of medical cannabis that Petitioner and qualified patients, qualified caregivers, and reciprocal patients may purchase or possess in terms of “units.” The amount of units allocated to Petitioner in any ninety-day period equates to eight-ounces.

9. By unlawfully limiting Petitioner's access to medicine, Respondents' regulatory scheme unlawfully denies Petitioner of the rights afforded to him, and other similarly situated qualified patients, by LECUA to the "beneficial use" of medical cannabis. NMSA 1978, Section 26-2B-2 ("The purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis").
10. Respondents' rules deny Petitioner and all others similarly situated of the rights afforded to them by the Cannabis Regulation Act to purchase up to two ounces of cannabis at any one time tax free, and to possess an unregulated amount of cannabis in their residence.
11. Respondent DOH is the state agency that, since 2007, has administered the Medical Cannabis Program pursuant to LECUA.
12. Respondent Dr. Tracie Collins is the Secretary of the Department of Health.
13. Respondent Dominick Zurlo is the Director of the Medical Cannabis Program within the Department of Health.
14. Respondent DOH maintains offices in the City of Albuquerque, Bernalillo County.
15. On June 29, 2021, the effective date of the Cannabis Regulation Act, the "the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the "Cannabis Control Division within the Regulation and Licensing Department." *See Cannabis Regulation Act, 2021 N.M. Laws (1st S.S.), ch. 4, §5 (referred to herein as "Cannabis Regulation Act" or "CRA")*.
16. Because of the transfer of duties from Respondent DOH to Respondent RLD, Petitioner has named both agencies and personnel from both agencies as respondents.
17. Respondents have also claimed that Respondent DOH will continue to have the power to regulate the supply of medical cannabis, including the power to regulate how much medical

cannabis Petitioner may purchase or possess beyond June 29, 2021. Petitioner fundamentally disagrees with Respondents' claim because the Cannabis Regulation Act has abolished the regulatory power to regulate "adequate supply" altogether.

18. Respondent Linda Trujillo is the Superintendent of the Regulation and Licensing Department.

19. Respondent John Blair is the Deputy Superintendent of the Regulation and Licensing Department.

20. Respondent Robert Sachs is the Deputy Policy Director of the Cannabis Control Division within the Regulation and Licensing Department.

21. Respondent RLD maintains offices in the City of Albuquerque, Bernalillo County, New Mexico.

22. The District Court has jurisdiction over Petitioner's request for mandamus.

23. Jurisdiction is proper in this Court pursuant to the Constitution of the State of New Mexico and NMSA 1978, § 44-2-1 *et seq.*

24. Venue is proper in the Second Judicial District.

*RESPONDENTS CONTINUE TO ENFORCE UNLAWFUL RULES THAT VIOLATE PETITIONER'S RIGHT TO PURCHASE UP TO TWO-OUNCES OF MEDICAL CANNABIS TAX FREE AND TO POSSESS AN UNREGULATED SUPPLY OF MEDICAL CANNABIS IN HIS RESIDENCE IN VIOLATION OF THE RIGHTS AFFORDED HIM BY THE CANNABIS REGULATION ACT*

25. LECUA historically conferred the power, and duty, to "define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments" upon Respondent DOH. NMSA 1978, 26-2B-7 (A)(2).

26. The Cannabis Regulation Act abolished this power on June 29, 2021 and replaced it with a statutory guarantee that all qualified patients, qualified caregivers, and reciprocal patients may purchase two-ounces of medical cannabis at *any one time* tax free.
27. Respondents continue to enforce an unlawful rule that limits the amount of medical cannabis that Petitioner may purchase to no more than a cumulative eight-ounces in any ninety-day period, in violation of the rights afforded to Petitioner by the Cannabis Regulation Act. 7.34.9(A) NMAC (limiting the amount of medical cannabis a qualified patient may possess in a ninety-day period to a cumulative 230 units, or 8-ounces).
28. Respondents also continue to enforce an unlawful rule that likewise limits the amount of medical cannabis that a Licensed Cannabis Producer may sell to Petitioner to no greater than a cumulative eight-ounces in any ninety-day period. 7.34.4.8(L) NMAC (limiting the amount of medical cannabis that a Licensed Cannabis Producer may sell to a qualified patient to no more than a cumulative 8-ounces in any ninety-day period).
29. Respondents enforce these unlawful purchase and possession limitations on qualified patients via a database tracking system called BioTrack. Respondents require all of New Mexico's Licensed Cannabis Producers to use BioTrack. Salespeople at licensed dispensaries must enter the volume of each purchase into BioTrack, and because the database is shared among all licensed producers, the system tracks the patient's overall purchases. If BioTrack reports that a qualified patient has already purchased eight-ounces in the previous ninety-days days, the licensed dispensary cannot complete the sale through BioTrack and the qualified patient is denied access to the medicine they need.
30. The unlawful eight-ounce purchase/possession limitation is enforced collectively among the state's 33 licensed cannabis producers. A qualified patient cannot go to an Ultra Health

dispensary, buy eight-ounces, then go to a Sacred Garden dispensary, buy eight-ounces, and then go to a Pecos Valley dispensary and buy a third eight-ounces in the same day. The qualified patient can only buy a cumulative eight-ounces in a 90-day period overall, because all of the state's dispensaries and producers must use the same BioTrack database.

31. The Cannabis Regulation Act took effect on June 29, 2021. The New Mexico Compilation Commission has yet to compile the Cannabis Regulation Act. References in this *Verified Petition* and this Writ of Mandamus shall, therefore, refer to the section numbers of the bill as currently promulgated in the Session Laws of New Mexico.
32. The Cannabis Regulation Act is a comprehensive statement on cannabis policy in New Mexico. NMSA 1978, § 12-2A-10 (Uniform Statutory Construction Act) (“If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably.”).
33. The Cannabis Regulation Act abolishes Respondents’ power to regulate the “adequate supply” of medical cannabis and replaces it with a statutory *guarantee* that Petitioner, as well as all other qualified patients, qualified caregivers, and reciprocal patients duly enrolled in the New Mexico Medical Cannabis Program, may purchase two-ounces of medical cannabis at any one time, tax free, beginning on June 29, 2021. The Cannabis Regulation Act *does not* abolish Petitioner’s right to benefit from the use of medical cannabis as afforded to him by LECUA.
34. Effective June 29, 2021, the Cannabis Regulation Act provides that any “person” may purchase no more than two ounces of cannabis, sixteen grams of cannabis extract, and eight hundred milligrams of edible cannabis “at one time.” 2021 N.M. Laws (1st S.S.), ch. 4, §3(B)(4)(a). Petitioner is a person.

35. Other sections of the Cannabis Regulation Act confirm the Legislature’s intent to abrogate the “adequate supply” regulatory power and permit qualified patients, qualified caregivers, and reciprocal patients to purchase up to two-ounces of medical cannabis at any one time, tax free, beginning on June 29, 2021:

- a. Chapter 4, Section 25(A)(1) of New Mexico Laws of 2021 (1st S.S.) (Cannabis Regulation Act) provides that the “following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person...possessing, using, being under the influence of, displaying, purchasing, obtaining or transporting not more cannabis than authorized by the Cannabis Regulation Act or the medical cannabis program.” As noted above, the Cannabis Regulation Act authorizes all “persons” to purchase up to two-ounces of cannabis at any one time.
- b. Chapter 4, Section 25(A)(2) of New Mexico Laws of 2021 (1st S.S.) (Cannabis Regulation Act) provides that the “following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person ...possessing in excess of two ounces of cannabis, sixteen grams of cannabis extract and eight hundred milligrams of edible cannabis if the excess is stored in the person’s private residence and not visible from a public place.” This section makes clear the Legislature's intent to regulate the amount of cannabis that persons may purchase at “any one time,” but not the amount of cannabis that Petitioner and other similarly situated qualified patients may possess in their homes. Respondents’ regulatory scheme which limits the amount of cannabis that Petitioner may *possess* in any ninety-day period to a cumulative eight-

ounces irreconcilably conflicts with these statutory provisions and is thus unenforceable as of June 29, 2021. *See* 7.34.9(A) NMAC (limiting the amount of medical cannabis a qualified patient may **possess** in a ninety-day period to a cumulative 230 units, or 8-ounces).

- c. Chapter 4, Section 6(M) of New Mexico Laws of 2021 (1st S.S.) (Cannabis Regulation Act) states that “[a]s to activity under the medical cannabis program, the licensee shall continue to operate under rules promulgated for the medical cannabis program until the division promulgates rules for medical cannabis activity, **except that a qualified patient**, a primary caregiver and a reciprocal participant **shall not be prohibited from purchasing and obtaining cannabis products** pursuant to the medical cannabis program” (emphasis added). This provision confirms the Legislature's intent to strip Respondents of their regulatory authority to prohibit, or otherwise limit, Petitioner and other qualified patients, qualified caregivers, and reciprocal patients from purchasing and possessing medical cannabis.
36. The Legislature did not limit the right to purchase up to two-ounces of medical cannabis at one time to non-medical cannabis purchasers only.
37. To wit, the Cannabis Regulation Act amended sections of LECUA and created new sections of law to govern the regulation and taxation of the nascent recreational cannabis market. In developing this statutory scheme, the Legislature was aware of what rights and obligations it wished to reserve to medical cannabis patients alone. For example, the state gross receipts tax and cannabis excise tax is not applied to medical cannabis sales.
38. The Legislature could have limited the right to purchase at least two-ounces of cannabis at



any one time to recreational, non-medical purchasers *only* if they wished to. For example, the Legislature could have written that “any person *that is not* a qualified patient, qualified caregiver, or reciprocal patient” is entitled to purchase up to two-ounces of cannabis at any one time as of June 29, 2021. The legislature chose not to.

39. Respondent DOH and Respondent RLD have construed Sections 3(B)(4)(a), 25(A)(1), 25(A)(2), and 6(M) of the Cannabis Regulation Act, 2021 N.M. Laws (1st S.S.), ch. 4, incorrectly so as to deny Petitioner and other qualified patients of the new rights afforded to them by the law; specifically the right to purchase two-ounces of medical cannabis, tax free, at any one time effective June 29, 2021 and the right to possess an unregulated amount of cannabis his home.

40. On April 23, 2021, Respondent Trujillo gave an interview to local news reporters. The interview was broadcast on Facebook Live, and the recording of it is accessible at <https://www.facebook.com/nminfocus>. New Mexico In Focus, Ask Us Anything on Legalized Cannabis - Growing Forward, Facebook (Apr. 23, 2021, 1:00 PM), <https://fb.watch/5s3XkMek9O/>.

41. Respondent Trujillo was asked about purchase limitations applicable to qualified patients and responded that Respondents’ current purchase/possession limitation (a cumulative eight-ounces over any ninety-day period) would remain in effect on *and after* June 29, 2021. Respondent Trujillo also suggested that only an “adequate supply” of medical cannabis purchased by qualified patients (eight-ounces) would be exempt from state gross receipts and the cannabis excise tax.

42. On May 5, 2021 Respondent Collins and Respondent Trujillo responded to a letter submitted to their agencies by several licensed cannabis producers seeking clarification on

how Respondents interpret and thus intend to enforce Sections 3(B)(4)(a), 25(A)(1), 25(A)(2), and 6(M) of the the Cannabis Regulation Act, 2021 N.M. Laws (1st S.S.), ch. 4. A copy of this letter is attached hereto as Exhibit B.

43. In their letter, Respondents Collins and Trujillo make clear that Respondents will continue to enforce Respondent DOH's unlawful regulatory scheme and limit the amount of cannabis that qualified patients may purchase *and* possess, tax free, to only a cumulative eight-ounces over any ninety-day period following enactment of the Cannabis Regulation Act on June 29, 2021.
44. Respondents' construction and application of Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) directly affects and unlawfully abrogates the rights afforded to Petitioner under the Cannabis Regulation Act to purchase, tax free, two-ounces of medical cannabis at any one time beginning on and after June 29, 2021.
45. The Legislature is supreme. N.M. Const. Art. IV, Section 1 ("The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico."). It is well established, then, that agency rules which conflict with statutes enacted by the Legislature are unenforceable. Qwest Corp. v. N.M. Pub. Regulation Comm'n, 2006–NMSC–042, ¶ 20, 140 N.M. 440, 143 P.3d 478 ("Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes."); Wilcox v. New Mexico Bd. of Acupuncture and Oriental Medicine, 2012-NMCA-106, ¶ 7, quoting *Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984) ("An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority."); State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 22, 961 P.2d 768 ("The administrative agency's discretion

may not justify altering, modifying or extending the reach of a law created by the Legislature.”).

46. Respondent DOH and Respondent RLD argue that their interpretation of the Cannabis Regulation Act is correct because the Cannabis Regulation Act “does not authorize commercial cannabis purchases to begin on June 29, 2021. Rather, Section 6(K) of the CRA states that the Cannabis Control Division shall determine when retail sales of commercial cannabis products begin, and that those sales shall begin no later than April 1, 2022.” Exhibit B.
47. Respondents’ interpretation is incorrect and ignores that Section 25(A)(1) of the Cannabis Regulation Act plainly states that, effective on June 29, 2021, the “following conduct is lawful for a person who is twenty-one years of age or older and shall not constitute grounds for detention, search or arrest of a person...**possessing**, using, being under the influence of, displaying, **purchasing, obtaining** or transporting not more cannabis than authorized by the Cannabis Regulation Act **or** the medical cannabis program” (emphasis added). Cannabis Regulation Act, 2021 N.M. Laws (1st S.S.), ch. 4, §25(A)(1).
48. Clearly, purchasing of cannabis is lawful as of June 29, 2021, although legal sales are still restricted to qualified patients, qualified caregivers, and reciprocal patients only. Respondents’ construction of the statute makes sense only if the Court reads words into the statute to restrict the rights afforded to Section 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(K) of the Cannabis Regulation Act to non-medical cannabis purchasers only. This is something the Court cannot do. State v. Lopez, 2011-NMCA-071, ¶ 10, 150 N.M. 34, 37, 256 P.3d 977, 980 (“we do not read into the statute any words that are not in the statutory language.”).

49. The plain language of Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.), makes clear the Legislature’s intent to set the amount of cannabis that qualified patients, qualified caregivers, and reciprocal patients can purchase at any one time, tax free, to two-ounces at a time. This is a substantial increase to Respondent DOH’s current medical cannabis purchase/possession limit of a cumulative eight-ounces in any ninety day period.
50. The Legislature chose to make the rights afforded by the Cannabis Regulation Act available to *persons*; it did not qualify these rights as belonging to non-medical cannabis purchasers only. State v. Richardson, 1992-NMCA-041, ¶ 4, 113 N.M. 740, 741, 832 P.2d 801, 802 (“In addressing the question raised in this appeal, our primary focus is to give effect to the intention of the legislature. In doing so, we examine the language used in the relevant statutes. If the language is clear and the meaning of the words used is unambiguous, then a common-sense reading of the statutes will suffice, with no construction necessary”).
51. Given the plain language of Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.), there is no need for further statutory interpretation because the intent of the Legislature is clear.

*RESPONDENTS’ UNLAWFUL RULES SUBJECT PETITIONER TO AN ILLEGAL TAX  
IN VIOLATION OF LEGISLATIVE INTENT AND EQUAL PROTECTION PRINCIPLES*

52. Respondents’ construction of Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.), is also clearly motivated by the state’s desire to collect taxes from Petitioner and all patients in the medical cannabis system.

53. As Respondents admit, the agency action taken in the May 5, 2021 letter will require Petitioner, qualified patients, qualified caregivers, and reciprocal patients to purchase medical cannabis in excess of their eight-ounces-per-ninety days from the recreational market. When they do so, qualified patients like Petitioner will be required to pay state gross receipts and cannabis excise tax on their purchases of medicine. This in turn creates additional financial barriers between qualified patients and the medicine they need.
54. Respondents' May 5, 2021 letter also attempts to add numerous words to the tax provisions of the Cannabis Regulation Act in violation of Legislative intent. The letter claims that "to the extent that a qualified patient's purchases exceed the rolling 90-day adequate supply limit, those additional, 'commercial cannabis' purchases will not be deemed exempt from the cannabis excise tax or gross receipts tax." Exhibit B.
55. Neither the gross receipts tax deduction nor the excise tax exemption sections of the Cannabis Regulation Act contain any limitation on the volume of medical cannabis to which the deduction/exemption applies. The statute is clear: the exemptions apply to *all* medical cannabis that a qualified patient purchases.
56. The Legislature understood and considered that *all, not some*, purchases of medical cannabis would be exempt from gross receipts tax and the cannabis excise tax upon enactment of the Cannabis Regulation Act:

"The bill exempts medical sales of cannabis from gross receipt taxes upon enactment of HB2 [the Cannabis Regulation Act] which is assumed to be 90 days following adjournment. Exempting medical cannabis sales from GRT revenue has a negative impact of \$9.7 million to the general fund and a negative local GRT impact of \$6 million in the first year. Estimates include the latest data on medical sales in New Mexico and modest growth rates; however, the cost of this exemption could increase significantly if sales grow more quickly than assumed." Legislative Finance Committee, *Fiscal Impact Report*, New Mexico Legislature (Mar. 30, 2021),

<https://nmlegis.gov/Sessions/21%20Special/firs/HB0002.PDF> [EXHIBIT C].

57. The Fiscal Impact Report on the Cannabis Regulation Act confirms that the Legislature was aware that enacting the Cannabis Regulation Act meant that *no* medical cannabis sales would be subject to either gross receipts tax or the cannabis excise tax, and analyzed the fiscal costs of these policy choices. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 35, 117 N.M. 346, 871 P.2d 1352 (explaining that that courts may consider contemporaneous documents presented to and presumably considered by the legislature, such as Fiscal Impact Reports, when discerning legislative intent).
58. Respondents are violating Legislative intent by subjecting *any* purchase of medical cannabis to state gross receipts tax or cannabis excise tax.
59. Respondents' selective enforcement of the purchase limitation on medical cannabis patients, who by definition suffer from debilitating medical conditions, also violates equal protection principles.
60. By claiming that medical cannabis is only tax exempt up to a certain volume, Respondent DOH and Respondent RLD violate equal protection principles by unfairly discriminating between particular medical treatments with respect to taxation.
61. A patient with epilepsy can get a gross receipts tax exemption on conventional pharmaceuticals without any volume limitation, but that same patient can get only a limited exemption on medical cannabis that treats the same condition equally well or better. The Legislature did not intend for the application of such a *limited* gross receipts and cannabis excise tax exemption to medical sales.
62. In New Mexico, "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M.

Constitution, Article II, Section 18.<sup>2</sup> “An equal protection claim arises when a state actor treats similarly situated groups or persons differently.” Gentry v. Timberon Water and Sanitation Dist., 2016-NMCA-019, ¶ 8. Respondents treat medical cannabis patients differently than all other persons twenty-one years of age or older in New Mexico. This discrimination is not sanctioned by, and is directly contrary to, the plain language of the Cannabis Regulation Act.

63. On June 29, 2021, all *persons* twenty-one years of age or older in New Mexico may lawfully purchase and possess two ounces of cannabis, sixteen grams of cannabis extract, and eight hundred milligrams of edible cannabis *at one time*, and they can even lawfully purchase these amounts *from illicit sources* under state law.
64. At the same time, on June 29, 2021, medical cannabis patients—who, by definition, suffer from debilitating medical conditions such as ALS, cancer, and epilepsy—may only lawfully purchase eight-ounces of medical cannabis tax free in any 90-day-period.
65. There is no conceivable rational basis to explain why a non-medical purchaser can buy more cannabis from an unlawful source than medical purchasers can buy from a lawful source.
66. On June 29, 2021, as a result of Respondents agency action, the 116,000+ qualified patients in New Mexico who depend on cannabis to treat and manage their medical conditions will have fewer rights to purchase cannabis than the average person in the street.
67. By denying qualified patients of the rights afforded to them by the Cannabis Regulation Act, Respondents force Petitioner and others so similarly situated to undertake unnecessary risk in order to access the supply of medical cannabis they require.

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<sup>2</sup> To be clear, Petitioner makes a state equal protection claim. Petitioner does not raise a claim under the United States Constitution at this time.

68. In Colorado and Arizona, cannabis is fully legal and New Mexico residents need only show proof of age in order to buy cannabis in those states. If a New Mexico qualified patient purchases cannabis in Colorado and Arizona and then brings it into New Mexico, they risk federal prosecution due to cannabis' status as a Schedule 1 controlled substance under federal law.
69. A qualified patient that purchases cannabis from another state must also pay sales tax. In this way, Respondents' regulatory scheme financially penalizes the sickest and most medically fragile patients who must pay sales tax on the amount of medical cannabis they purchase from a regulated source (e.g. New Mexico, Colorado, or Arizona) in excess of eight-ounces in any given ninety day period. Price is a major determinant of a qualified patient's ability to access the medication they need, as neither private insurers (other than in Workers' Compensation) nor state/federal-sponsored health plans like Medicare or Medicaid, cover medical cannabis as a benefit.
70. By increasing the tax burden, and thus the price, of medical cannabis, Respondents' regulations create unnecessary and discriminatory barriers to a qualified patients' ability to access medicine based upon their ability to pay. This is certainly not the sort of system the Legislature envisioned when crafting the Cannabis Regulation Act.
71. If a qualified patient purchases cannabis from illicit sources—from the "black" market—they risk ingesting cannabis that has not been tested for purity or contaminants, that is not potent enough for their conditions, or that has been grown in unhygienic conditions.
72. If qualified patients cannot purchase enough medical cannabis from lawful, licensed producers, their debilitating medical conditions may worsen. This in turn may interfere



with their ability to work, may negatively affect other health conditions, and may increase other medical expenditures.

*ANY CONFLICTS BETWEEN LECUA AND THE CANNABIS REGULATION ACT MUST BE  
RESOLVED IN FAVOR OF THE CANNABIS REGULATION ACT*

73. Respondent DOH and Respondent RLD also claim in the May 5, 2021 letter that the Cannabis Regulation Act preserved Respondents' power to limit the amount of medical cannabis that qualified patients may purchase to an "adequate supply." To wit, Respondents claim that the Legislature "was careful to keep" the "adequate supply" provisions "in place" within LECUA.<sup>3</sup> Exhibit B.

74. Respondents are correct that an irreconcilable conflict exists between Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), 5, and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.), and the earlier enacted Section 26-2B-7(A)(2) of LECUA (NMSA 1978, §26-2B-7(A)(2)).<sup>4</sup>

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<sup>3</sup> Respondent DOH has taken the exact opposite position in other litigation now pending in state district court before the First Judicial District (Biedschied, B. presiding). In D-101-CV-2016-10971, Respondent DOH continues to take the position that it no longer has the power to regulate the adequate supply of medical cannabis as of June 29, 2021. Respondent DOH also concedes that the Cannabis Regulation Act has reduced the agency's role with respect to the medical cannabis program to regulating the patient registry only.

<sup>4</sup> Section 5 of the Cannabis Regulation Act states in relevant part that "Except for administration of the medical cannabis registry, the power, duty and authority of the department of health related to the medical cannabis program shall be transferred to the division on the effective date of the Cannabis Regulation Act." This Section directly and irreconcilably conflicts with the provisions of Section 26-2b-7(A) of LECUA which imply that Respondent DOH will continue to have the power to regulate the "adequate supply" of cannabis after June 29, 2021. As discussed herein the Court must resolve this conflict in favor of the Cannabis Regulation Act and hold that existing provisions of LECUA (26-2B-3(A), 26-2B-4; 26-2B-4(C)(1)-(2)) which imply that Respondent DOH, or Respondent RLD, has the authority to regulate the "adequate supply" of medical cannabis after June 29, 2021 irreconcilably conflict with the Cannabis Regulation Act and are therefore unenforceable as a matter of law.

75. The Court, however, must resolve this irreconcilable conflict in favor of the Cannabis Regulation Act.
76. As the later enacted statute, the Cannabis Regulation Act's provision which guarantees Petitioner the right to possess an unregulated amount of medical cannabis (purchased two-ounces at a time, tax free) takes precedence over Section 26-2B-7(A)(2) and other conflicting sections of LECUA.
77. The Cannabis Regulation Act also takes precedence over conflicting sections of LECUA because it is a comprehensive revision of the law on the subject of cannabis purchase limitations applicable to all "persons" including qualified patients, qualified caregivers, and reciprocal patients. NMSA 1978, § 12-2A-10 (C) ( "If a statute is a comprehensive revision of the law on a subject, it prevails over previous statutes on the subject, whether or not the revision and the previous statutes conflict irreconcilably."). The Legislature indicated no intent within the Cannabis Regulation Act to exclude qualified patients, qualified caregivers, or reciprocal patients from its definition of "person."
78. While NMSA 1978, Section 26-2B-7(A)(2) and other sections of LECUA may still mention the "adequate supply" power as alive after June 29, 2021, they have no legal effect given the provisions of the Cannabis Regulation Act that have superseded and supplanted them.
79. On June 29, 2021 the "adequate supply" concept is nothing more than a remnant of past legal regimes—a vestigial organ, like the appendix, left in the body by evolution but without any discernible function. Something to be studied, but not regulated. *See* Chapter 4, Section 3(J)(1) of New Mexico Laws of 2021 (1st S.S.) (assigning only the duty to

“study” the adequate supply of medical cannabis to Respondent RLD effective June 29, 2021).

80. Respondents’ position as stated in the May 15, 2021 letter, therefore, directly conflicts with the plain language of and Legislative intent behind Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.).

81. Petitioners’ request for a mandamus order directing Respondents to comply with the non-discretionary duty imposed upon them by Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.) is ripe for judicial review.

82. The Cannabis Regulation Act is now the law of the land. Respondents continue to enforce 7.34.9(A) NMAC and 7.34.4.8(L) NMAC in violation of the rights afforded to Petitioner and tens-of-thousands of other qualified patients in Bernalillo County by the Cannabis Regulation Act.

*PETITIONER’S VERIFIED APPLICATION IS RIPE FOR A DECISION AND PETITIONER  
WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT A REMEDY  
FROM THIS COURT*

83. Collectively, Respondent Trujillo’s statements on April 23, 2021 in addition to Respondent DOH and Respondent RLD’s letter of May 5, 2021 constitute final agency action on the question of what purchase limitation Respondents will impose upon Petitioner and other qualified patients, qualified caregivers, and reciprocal patients upon the effective date of the Cannabis Regulation Act, June 29, 2021. This controversy is therefore now ripe for judicial review.

84. Petitioner will continue to suffer direct, inevitable, and imminent harm if the Court does not order Respondents to comply with the non-discretionary duty imposed upon them by Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.). 7.34.9(A) NMAC and 7.34.4.8(L) NMAC will remain in effect until repealed or amended by Respondent RLD. *See* Section 70 of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.) (“Except to the extent any administrative rules are inconsistent with the provisions of this act, any administrative rules adopted by an officer, agency or other entity whose responsibilities have been transferred pursuant to the provisions of this act to another officer, agency or other entity remain in force until amended by the officer, agency or other entity to which the responsibility for the adoption of the rules has been transferred. To the extent any administrative rules are inconsistent with the provisions of this act, such rules are null and void”). There is no indication that any such agency action is likely or reasonably forthcoming. There is no indication that any such agency action is likely or reasonably forthcoming. *See eg.* Cannabis Control Division, *Proposed Rules*, NMRLD Cannabis Control Division (May 25, 2021), <https://ccd.rld.state.nm.us/wp-content/uploads/2021/05/May-25-2021-Cannabis-Control-Division-Proposed-Rules.pdf> (showing RLD’s proposed rules as of May 25, 2021 absent any contemplation of repeal or revision of 7.34.9(A) NMAC or 7.34.5.8(L) NMAC in this round of rule making).
85. 7.34.9(A) NMAC and 7.34.4.8(L) NMAC directly and irreconcilably conflict with Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4, of New Mexico Laws of 2021 (1st S.S.).

86. Absent intervention by this Court, Respondents will continue to deny Petitioner the rights afforded to him under LECUA and the Cannabis Regulation Act.

**COUNT ONE-WRIT OF MANDAMUS  
TO COMPLY WITH THE CANNABIS REGULATION ACT**

87. The Petitioner hereby incorporates all preceding paragraphs by reference as if fully set forth herein.

88. “Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable.” New Energy Econ. v. Martinez, 2011–NMSC–006, ¶ 10, 149 N.M. Additionally, “mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.” State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶ 19, 120 N.M. 562. “The authority to prohibit unlawful official conduct is implicit in the nature of mandamus.” State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 18, 125 N.M. 343.

89. In *State ex rel. Taylor v. Johnson*, the governor of New Mexico attempted to overhaul the state’s public assistance program without legislative approval. The New Mexico Supreme Court issued a writ of mandamus ordering 1) the governor and certain agency officials to “desist from implementation of their public assistance changes and 2) to administer the public assistance program in full compliance with existing law until it is constitutionally altered or amended by legislation signed into law by the Governor.” *Id.*, ¶ 1.

90. Here, Respondent DOH and Respondent RLD have elected to enforce an unlawful limitation on the amount of medical cannabis that Petitioner, qualified patients, qualified caregivers, and reciprocal patients may purchase and possess. These limitations are codified at 7.34.9 (A) NMAC and 7.34.8(L) NMAC. This limitation is unlawful and enforceable as of June 29, 2021 because it conflicts with multiple later-enacted portions of

the Cannabis Regulation Act and further violates the equal protection rights of Petitioner, qualified patients, qualified caregivers, and reciprocal patients.

91. Respondents' unlawful regulatory scheme has been nullified by later-enacted sections of the Cannabis Regulation Act that 1) statutorily set purchase limitations for all "persons" at two ounces of cannabis, sixteen grams of extract, and eight hundred milligrams of edible cannabis "at one time;" 2) allow the lawful possession and purchase of "not more cannabis than authorized by the Cannabis Regulation Act;" 3) allow the lawful possession of *more than* two ounces of cannabis, sixteen grams of extract, and eight hundred milligrams of edible cannabis; 4) state, "[a]s to activity under the medical cannabis program, the licensee shall continue to operate under rules promulgated for the medical cannabis program until the division promulgates rules for medical cannabis activity, **except** that a qualified patient, a primary caregiver and a reciprocal participant **shall not be prohibited from purchasing and obtaining cannabis products;**" 5) and which are a comprehensive revision of the law on the subject of cannabis.

92. Respondents' purchase limitations violate equal protection principles because they will subject New Mexicans with debilitating medical conditions who are dependent on medical cannabis to lower purchase limitations than persons who purchase cannabis from the recreational (and taxed) market. Respondents' unlawful rules also attempt to impose an illegal tax on *any* medical cannabis purchases in violation of the Cannabis Regulation Act.

93. Mandamus will issue if there is no "plain, speedy and adequate remedy in the ordinary course of law." NMSA 1978, § 44-2-5 (1884). Petitioner has no other plain, speedy, or adequate remedy at law to force Respondents' to respect the rights conferred upon

Petitioner by Sections 3(B)(4)(a), 25(A)(1), 25(A)(2), and 6(M) of the Cannabis Regulation Act, Chapter 4 of New Mexico Laws of 2021 (1st S.S.).

94. An order of mandamus from this court is proper, and necessary, to compel Respondents to comply with their non-discretionary duty to permit Petitioner, as well as all qualified patients, qualified caregivers, and reciprocal patients, to purchase two-ounces of cannabis, tax free, at any one time effective on June 29, 2021.

**RESPONDENTS ARE THEREFORE COMMANDED TO EITHER:**

1. Cease enforcement of the purchase and possession limitations on medical cannabis, found at 7.34.9(A) NMAC and 7.34.8(L) NMAC, on and after June 29, 2021 on grounds that these provisions irreconcilably conflict with the Cannabis Regulation Act, specifically Sections 3(B)(4)(a), 25(a)(1), 25(a)(2), and 6(M) thereof;
2. Comply with the clear, indisputable, and non-discretionary duty imposed upon them by the Cannabis Regulation Act and allow qualified patients, qualified caregivers, and reciprocal patients to purchase, tax free, two ounces of cannabis, sixteen grams of extract, and eight hundred milligrams of edible cannabis at any one time beginning on and after June 29, 2021; and
3. Modify the BioTrack system to allow medical cannabis sales to be completed as described herein as of June 29, 2021;

**OR**


4. Serve and file a responsive pleading by September 20, 2021 pursuant to Rule 1-065 NMRA (E) and (F); and

5. Show cause before this Court at 9:30 a.m. on the 2<sup>nd</sup> day of November, 2021 why you should not do so.

The form of Alternative Writ presented by the Petitioner has been slightly modified to conform to the requirements of NMSA 1978, Section 44-2-6 (“The alternative writ shall . . . command [the defendant], that immediately after the receipt of the writ . . . he do the act required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so . . .”).

Petitioner shall immediately serve this writ on all parties entitled to service in accordance with Rule 1-065(H) and Rule 1-004 NMRA.

**IT IS SO ORDERED.**

  
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JUDGE BENJAMIN CHAVEZ  
DIVISION XIX