

EXHIBIT “B”

EXHIBIT “B”

copy

New law takes affect

April 1, 2014

Please read through your packet

Completely and Carefully

**Nevada Division of Public and Behavioral Health
Medical Marijuana Cardholder Application Packet
Initial**

The following forms must be submitted with **original signatures**, copies will not be accepted. Application packets must be submitted to the Division of Public and Behavioral Health by the cardholder or caregiver of record. Acceptance notification will be mailed to the address provided on the application.

- _____ **Registration Application Form:** This form must be filled out completely. Please note that the application number assigned is associated with the cardholder/caregiver of record and is not transferable. Caregiver information should be noted in the cardholder application, section B. If none, please write "NONE" in section B.
- _____ **Acknowledgement Form:** This form must be signed by a Notary Public and must include a valid notary seal.
- _____ **Waiver Form:** This form must be signed by a Notary Public and must include a valid notary seal.
- _____ **Attending Physician's Statement Form:** This form must be filled out completely by a Nevada Licensed Physician and include original signature and date. Attending Physician's Statements older than 3 months will not be accepted. Caregivers do not have to complete this form. Caregiver information shall be noted on the Cardholder Attending Physician Statement in section C. If none, physician shall write "NONE" in section C.
- _____ **Photocopy of Nevada ID:** You must provide a copy of your Nevada Driver's License or Nevada ID Card issued by the Nevada Department of Motor Vehicles. Seasonal ID cards will not be accepted.
- _____ **Registration Fee:** Include a check, money order, or cashier's check made payable to the Division of Public and Behavioral Health (DPBH) in the amount of \$75.00.

Please be aware that pursuant to NAC 453.100 the Division will request a name-based check of an applicant, a caregiver or the parent of a child from the Central Repository for Nevada Records of Criminal History and, if such check is inadequate to determine the criminal history of an applicant, caregiver or parent of a child, the Division may request a complete set of the fingerprints of the applicant and the designated primary caregiver, if any.

Please be aware that pursuant to NRS 453A.250 and NAC 453A.150:

1. A cardholder may have only one caregiver;
2. A caregiver can only be a caregiver to one cardholder; and
3. A cardholder cannot be a caregiver to another cardholder.

Mail completed forms to:
Division of Public and Behavioral Health
Medical Marijuana Registry
4150 Technology Way, Suite 104
Carson City, NV 89706

Please be advised that incomplete or illegible packets will be returned and may result in a significant delay in the processing of your application.

NEVADA MEDICAL MARIJUANA REGISTRY FACTS

Please read carefully before submitting your application. All fees collected by the Nevada Medical Marijuana Registry are non-refundable.

- ❖ All required cardholder/caregiver application forms must be filled out completely. Incomplete or illegible application packets will be returned, delaying the acceptance process.
- ❖ Issuance of a Nevada Medical Marijuana Registry card does not exempt the holder from prosecution under the state or federal laws that apply to marijuana and is not recognized by the federal government. NRS 453A is a state law; it does not address federal laws. It is recommended you discuss the limitations and liabilities that are associated with existing federal laws with your personal attorney.
- ❖ The registry card is issued for use in Nevada, and may not be recognized in other states.
- ❖ NRS 453A.200 allows the holder of a valid card to possess: (Effective April 1, 2014 through March 31, 2016)
 - Two and one half ounces of usable marijuana in any one 14 day period
 - Twelve marijuana plants, irrespective of whether the marijuana plants are mature or immature
- ❖ "Marijuana" includes, without limitations edible and infused products as defined in NRS 453A.101 and 112.
- ❖ "Usable marijuana," as defined in NRS 453A.160, means the seeds, dried leaves and flowers of a plant of the genus Cannabis, and any mixture or preparation thereof that is appropriate for the medical use of marijuana. The term does not include the stalks and roots of the plant.
- ❖ A person under 18 must have permission from their custodial parent or legal guardian who is in charge of medical decisions. The parent or guardian must act as the minor's primary caregiver. A Minor Release Form must be submitted with the application packet.
- ❖ The Medical Marijuana Registry cannot advise you on where to obtain marijuana.
- ❖ The Medical Marijuana Registry cannot make physician referrals.
- ❖ A Medical Marijuana Registry card is good for one year. Your card must be renewed annually. If you lose your card, please contact the Medical Marijuana Registry immediately at (775) 687-7594. Do not call the Department of Motor Vehicles (DMV).
- ❖ The Medical Marijuana Registry must be notified in writing of the following changes to Cardholder or Caregiver information or status within 7 days of the change. Cardholder and Caregiver registry identification card can be revoked if you fail to notify us of these changes and this could prevent future entry into the Registry.
 - Change of address
 - Change of adult persons living at residence
 - Change of phone number
 - Change in medical status
 - Change of status with regard to criminal convictions
 - Changes pertaining to designated caregivers
- ❖ If you leave the Medical Marijuana Registry, you must return your cardholder/caregiver registry identification card to the Medical Marijuana Registry within 7 days.
- ❖ You must be a resident of Nevada as evidenced by a current Nevada driver's license or identification card issued by the Nevada Department of Motor Vehicles. Seasonal driver's license or identification cards are not accepted.
- ❖ You will receive a temporary acceptance letter, by mail, when we receive your application and the background process begins.
- ❖ Once the application process has been completed, you will be notified, by mail, of acceptance into the Medical Marijuana Registry.
- ❖ If accepted, you will be instructed to complete the process by taking your approval letter to an approved location of the Department of Motor Vehicles to have your Registry card made. Please do not contact the Department of Motor Vehicles until you have received this acceptance letter.
- ❖ Your Registry card does not replace your driver's license or identification card.
- ❖ If denied, you will receive, by certified mail, a letter of explanation with reason(s) for denial.

Please refer to our website <http://www.health.nv.gov> for Nevada Revised Statutes 453A and Nevada Administrative Code 453A. The laws and regulations can also be found at the Nevada State Library and county libraries.

Nevada Division of Public and Behavioral Health
Medical Marijuana Registry
4150 Technology Way, Suite 104
Carson City, NV 89706
(775)-687-7594

WARNING

Nevada Revised Statutes 484 – Traffic Laws

Pursuant to NRS 484 – Traffic Laws, a person who has a registry identification card issued by the Division of Public and Behavioral Health is NOT exempt from prosecution if:

1. *They drive, operate, or control a vehicle or vessel under power or sail while under the influence of medical marijuana. Unlawful amounts of marijuana in the blood or urine, per N.R.S. 484.379, are 10 nanograms per milliliter of urine and 2 nanograms per milliliter of blood.*
2. *They water ski, surfboard or use any similar device while under the influence of medical marijuana.*
3. *They operate an aircraft while under the influence of medical marijuana.*
4. *They have physical possession of a firearm while under the influence of medical marijuana.*
5. *They embark on an amusement ride while under the influence.*
6. *The possession of the marijuana or drug paraphernalia is discovered because the person engaged or assisted in the medical use of marijuana:*
 1. *In a public place.*
 2. *In a detention facility, county jail, state prison.*

EMPLOYER INFORMATION PAGE

453A.510

Professional licensing board prohibited from taking disciplinary action against licensee on basis of licensee's participation in certain activities in accordance with chapter. A professional licensing board shall not take any disciplinary action against a person licensed by the board on the basis that:

1. The person engages in or has engaged in the medical use of marijuana in accordance with the provisions of this chapter; or
2. The person acts as or has acted as the designated primary caregiver of a person who holds a identification card issued to him pursuant to paragraph (a) of subsection 1 of NRS 453A.220.

NRS 453A.800

Costs associated with medical use of marijuana not required to be paid or reimbursed; medical use of marijuana not required to be accommodated in workplace. (Effective April 1, 2014 through March 31, 2016) The provisions of this chapter do not:

1. Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana.
2. Require any employer to accommodate the medical use of marijuana in the workplace.
3. Require an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid identification card, provided that such reasonable accommodation would not:
 - a. Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
 - b. Prohibit the employee from fulfilling any and all of his or her job responsibilities.

PHYSICIAN INFORMATION PAGE

Some applicants have expressed concern that their physician will not recommend the use of medical marijuana. This page has been put together to help address that concern. Please refer to the Legislative website, www.leg.state.nv.us/NRS/Index.cfm, and go to NRS 453A for a complete copy of the law that authorizes this Registry.

NRS 453A.030, section 1 defines an attending physician as one who:

1. Is licensed to practice:
 - (a) Medicine pursuant to the provisions of chapter 630 of NRS; or
 - (b) Osteopathic medicine pursuant to the provisions of chapter 633 of NRS; and
2. Has responsibility for the care and treatment of a person diagnosed with a chronic or debilitating medical condition.

Under NRS 453A.040 and 050 a physician has been asked to do the following:

1. State that the patient/applicant has a qualifying disease:
 - a. Acquired Immune Deficiency Syndrome (AIDS)
 - b. Cancer
 - c. Glaucoma
 - d. Post-Traumatic Stress Disorder (PTSD)
 - e. A medical condition or treatment that produces one or more of the following:
 - (a) Cachexia
 - (b) Persistent muscle spasms, such as spasms caused by multiple sclerosis
 - (c) Seizures, such as seizures caused by epilepsy
 - (d) Severe nausea
 - (e) Severe pain
 - f. Any other medical condition that is:
 - (a) Classified as a chronic or debilitating medical condition by regulation of the State Health Division, or
 - (b) Approved as a chronic or debilitating medical condition pursuant to a petition submitted in accordance with NRS 453A.710.
2. Approve of the patient's primary caregiver if the patient has one.
 - a. A patient who is a minor must have a primary caregiver and that primary caregiver must be the patient's custodial parent or legal guardian in charge of medical decisions.
3. Explain to the patient and the primary caregiver, if there is one, that the use of medicinal marijuana may mitigate the symptoms of the patient's qualifying disease.
4. Explain to the patient and the primary caregiver, if there is one, the possible risks and possible benefits of medicinal marijuana.
5. See a photo identification of the patient in order to verify that the patient is the person named on the application. This would also apply to the caregiver if the patient has a caregiver.

NRS 453A.500 states, "Board of medical examiners prohibited from taking disciplinary action against attending physician on basis of physician's participation in certain activities in accordance with chapter..."

**REGISTRATION APPLICATION FOR PARTICIPATION IN THE
Nevada Medical Marijuana Registry**

Initial Application

I-20 _____

MAIL FORM TO: Division of Public and Behavioral Health
Medical Marijuana Registry
4150 Technology Way, Suite 104
Carson City, Nevada 89706

Issuance of a state of Nevada Medical Marijuana Card does not exempt the holder from prosecution under federal law

Per NRS 453A.810 "The state must not be held responsible for any deleterious outcomes from the medical use of marijuana by any person"

Instructions: Please complete all information in order to comply with the registration requirements of NRS 453A. Please attach copies of required identification. Please type or print legibly.



A APPLICANT INFORMATION

| | | |
|--|-------------------------|------------------------|
| NAME (LAST, FIRST, MIDDLE) | | DATE OF BIRTH |
| PHYSICAL ADDRESS | | PRIMARY PHONE NUMBER |
| CITY, STATE, ZIP CODE | | SECONDARY PHONE NUMBER |
| MAILING ADDRESS, IF DIFFERENT FROM ABOVE | | |
| SOCIAL SECURITY NUMBER | NEVADA DRIVER'S LICENSE | OR NEVADA I.D. NUMBER |
| PHOTO IDENTIFICATION: A PHOTOCOPY OF ONE OF THE FOLLOWING IS ATTACHED: PLEASE CHECK APPROPRIATE BOX. <input type="checkbox"/> DRIVER'S LICENSE <input type="checkbox"/> IDENTIFICATION CARD | | |
| HAVE YOU EVER BEEN CONVICTED OF A CRIME RELATED TO THE SALE OF A CONTROLLED SUBSTANCE? YES _____ NO _____ | | |

B PRIMARY CAREGIVER/GUARDIAN INFORMATION (If applicable)

| | | |
|---|--|------------------------------|
| NAME (LAST, FIRST, MIDDLE) | | DATE OF BIRTH |
| (If cardholder is a minor, the caregiver MUST be the custodial parent or the guardian in charge of medical decisions) SEE ATTACHED CAREGIVER APPLICATION | | (Office use only) ASSIGNED # |
| PRIOR TO THIS CAREGIVER HAVE YOU HAD A DESIGNATED CAREGIVER? NO _____ YES _____ IF YES, GIVE PREVIOUS CAREGIVER'S FULL NAME AND DATE OF BIRTH: | | |

C PLANS FOR GROWING MARIJUANA - REQUIRED

Participants in the Nevada Medical Marijuana Registry (MMR) must designate their physical address as their grow site. The only exception is when a participant has a primary caregiver or designates a dispensary.

I PLAN TO GROW MARIJUANA AT THE FOLLOWING LOCATION: ☐ Applicant's Address ☐ Caregiver's Address

NAMES OF OTHER ADULTS LIVING AT THE MEDICAL MARIJUANA GROW SITE:

The MMR is not a resource for the growing process and does not have information to give to cardholders
Effective April 1, 2014 pursuant to NRS 453A.210 you may designate a dispensary for you or your caregiver.

Dispensary Name and Address:

D SIGNATURE AND DATE

I TESTIFY THAT THE ABOVE INFORMATION IS TRUE, and give permission for my physician to release medical information and records requested by the Division of Public and Behavioral Health's Medical Marijuana Registry representative.

APPLICANT SIGNATURE -- (Sign in BLUE ink)

DATE

OFFICE USE ONLY

Reviewed By: _____
Date: _____

Authorized to cultivate, grow, produce:
Yes: _____ No: _____

Approve: _____
Deny: _____

30 day Temporary
Expiration Date:

Card Expiration
Date:

Assigned Number:

ATTENDING PHYSICIAN'S STATEMENT
Medical Marijuana Registry

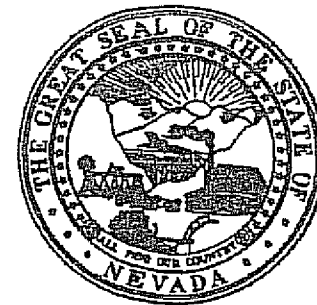
Initial Application

PLEASE RETURN FORM TO PATIENT

ISSUANCE OF A STATE OF NEVADA MEDICAL MARIJUANA CARD DOES NOT EXEMPT THE HOLDER OR OTHER PERSONS FROM PROSECUTION OR ADMINISTRATIVE ACTIONS UNDER FEDERAL LAW

PER NRS 453A.810

"THE STATE MUST NOT BE HELD RESPONSIBLE FOR ANY DELETERIOUS OUTCOMES FROM THE MEDICAL USE OF MARIJUANA BY ANY PERSON"



Instructions: Please complete all information in order to comply with the registration requirements of NRS 453A. This form does not constitute a prescription for marijuana.

| | | |
|----------|------------------------------------|---------------|
| A | PATIENT INFORMATION | |
| | PATIENT NAME (LAST, FIRST, MIDDLE) | DATE OF BIRTH |

| | | |
|-------------------------------------|-------------------------------|--------------------|
| B | PHYSICIAN INFORMATION | |
| | PHYSICIAN NAME (PLEASE PRINT) | |
| | OFFICE MAILING ADDRESS | OFFICE TELEPHONE # |
| | CITY, STATE, ZIP CODE | |
| NEVADA STATE MEDICAL LICENSE NUMBER | | |

| | | | | | | | |
|---|--|--|-----------------------------------|--------------------------------------|--|---|---|
| C | PHYSICIAN'S STATEMENT | | | | | | |
| | <p>Debilitating Medical Condition: Check appropriate boxes</p> <p><input type="checkbox"/> Acquired Immune Deficiency Syndrome (AIDS)</p> <p><input type="checkbox"/> Cancer</p> <p><input type="checkbox"/> Glaucoma</p> <p><input type="checkbox"/> Post-Traumatic Stress Disorder (PTSD)</p> <p><input type="checkbox"/> A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following:</p> <table border="0"><tr><td><input type="checkbox"/> Cachexia</td><td><input type="checkbox"/> Severe Pain</td></tr><tr><td><input type="checkbox"/> Severe nausea</td><td><input type="checkbox"/> Seizures, including, without limitation, seizures caused by epilepsy</td></tr><tr><td><input type="checkbox"/> Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis</td><td></td></tr></table> | | <input type="checkbox"/> Cachexia | <input type="checkbox"/> Severe Pain | <input type="checkbox"/> Severe nausea | <input type="checkbox"/> Seizures, including, without limitation, seizures caused by epilepsy | <input type="checkbox"/> Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis |
| <input type="checkbox"/> Cachexia | <input type="checkbox"/> Severe Pain | | | | | | |
| <input type="checkbox"/> Severe nausea | <input type="checkbox"/> Seizures, including, without limitation, seizures caused by epilepsy | | | | | | |
| <input type="checkbox"/> Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis | | | | | | | |

Comments:

| | |
|--|-------------------------|
| Caregiver Name (If patient is a minor the caregiver MUST be the custodial parent or the guardian in charge of medical decisions.) | Caregiver Date of Birth |
|--|-------------------------|

- I HEREBY CERTIFY THAT I, A DULY LICENSED PHYSICIAN TO PRACTICE MEDICINE IN NEVADA UNDER NRS 630 OR 633, HAVE PRIMARY RESPONSIBILITY FOR THE CARE AND TREATMENT OF THE ABOVE-NAMED PATIENT.

- THE ABOVE-NAMED PATIENT HAS BEEN DIAGNOSED WITH A DEBILITATING MEDICAL CONDITION AS LISTED ABOVE. MARIJUANA MAY MITIGATE THE SYMPTOMS OR EFFECTS OF THIS PATIENT'S CONDITION.

- I APPROVE OF THE ABOVE-NAMED CAREGIVER, (IF THERE IS ONE).

- I HAVE EXPLAINED TO THE ABOVE-NAMED PATIENT, AND THE ABOVE NAMED CAREGIVER, (IF ANY NAMED) THE POSSIBLE RISKS AND BENEFITS OF THE MEDICAL USE OF MARIJUANA.

- I ALSO CERTIFY THAT I HAVE SEEN A PHOTO IDENTIFICATION OF THIS PATIENT AND CAREGIVER, (IF THERE IS ONE) VERIFYING THAT HE/SHE IS THE PATIENT OR CAREGIVER (IF THERE IS ONE) NAMED ON THIS "ATTENDING PHYSICIAN'S STATEMENT."

THIS IS NOT A PRESCRIPTION FOR THE USE OF MEDICAL MARIJUANA

Physician's signature (Sign in BLUE ink)

Date:

WAIVER

MEDICAL MARIJUANA REGISTRY WAIVER AND LIABILITY RELEASE

In consideration for my participation in the *Medical Marijuana Registry*, I, _____, do hereby irrevocably agree to the following:

WAIVER OF LIABILITY

I, on behalf of myself and my heirs, executors, administrators, successors and assigns, do hereby unconditionally release and forever discharge from liability and promise to indemnify and hold harmless the State of Nevada, including but not limited to, the Department of Public Safety, the Division of Public and Behavioral Health and each and all of their agents, contractors, officers and employees, in both their official and individual capacities from any and all legal actions, except judicial review as specifically provided in the Medical Marijuana law, to include all claims, demands, actions, judgment, executions, costs, expenses, attorneys' fees, and rights to compensation whatsoever, that I now have, or may have, or claim to have which were created by, arose out of or may arise out of, directly or indirectly my participation in the Medical Marijuana Registry.

RELEASE OF INFORMATION

I authorize, for the term of registration, the State of Nevada, the Department of Public Safety, its agents or employees to release all information they may have concerning me as is necessary to process my application. This would include, but not be limited to, the release of the information necessary for obtaining a criminal background check, verifying my attending physician's status with the Board of Medical Examiners or Board of Osteopathic Medicine, providing information to the Department of Motor Vehicles for issuance of my registration card and providing information to the Nevada Highway Patrol if necessary to verify my registration in the registry.

This release of information may include, but not be limited to, information that is privileged or confidential or any sealed data or materials, or information ordered sealed in a court proceeding.

INVESTIGATION DISCOVERY WAIVER

I hereby waive, without reservation, any right I may have, now or in the future, to examine, review or otherwise discover the contents of this application investigation and all related documents thereto. This waiver shall apply to any right of action of any nature whatsoever, that may accrue to myself, my heirs, or my personal representative(s).

Dated this _____ day of _____, 20__

Signature of Person Waiving Rights

State of Nevada

Notary Public in and for said County of _____

Subscribed and Sworn before me this _____ day of _____, 20__

(Notary Seal)

Signature of Notary

ACKNOWLEDGEMENT

PLEASE READ AND INITIAL THE FOLLOWING STATEMENTS:

1. The federal government does not recognize the medical marijuana card and does not exempt the holder from prosecution under federal law. _____
Initial
2. The medical marijuana card is issued for use in Nevada, and may not be recognized by other states. _____
Initial
3. "The state must not be held responsible for any deleterious outcomes from the medical use of marijuana by any person." NRS 453A.810. _____
Initial

I, _____, acknowledge that I have read and understood the statements above.

Dated this _____ day of _____, 20____

Signature of Person Acknowledging Statement

State of Nevada
Notary Public in and for said County of _____

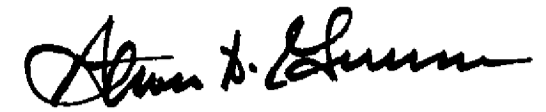
This instrument was acknowledged by _____ on this _____ day of _____, 20____

(Notary Seal)

Signature of Notary

EXHIBIT “A”

EXHIBIT “A”



CLERK OF THE COURT

1 **ORDR**

2
3
4
5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7 JOHN DOE, on his own behalf and on behalf of a
8 class of those similarly situated,

9 Plaintiff,

10 vs.

11 STATE OF NEVADA ex rel. THE
12 LEGISLATURE OF THE 77th SESSION OF THE
13 STATE OF NEVADA; STATE OF NEVADA
14 DEPARTMENT OF HEALTH AND HUMAN
15 SERVICES; THE HONORABLE BRIAN
16 SANDOVAL, in his official capacity as Governor
17 of the State of Nevada; DOES 1-100, inclusive; and
18 ROE CORPORATIONS 1-100, inclusive,

19 Defendants.

Case No. A-15-723045-C
Dept. No. XXXII

ORDER AND JUDGMENT

20 **INTRODUCTION**

21 This case involves several claims under federal and state law relating to the validity and operation
22 of the provisions of Nevada's medical marijuana laws which establish the medical marijuana registration
23 program and prescribe procedures and fees to apply for and obtain a registration card for purposes of
24 using medical marijuana as authorized by Article 4, Section 38 of the Nevada Constitution and NRS
Chapter 453A. For the reasons explained herein, the Court concludes that the medical marijuana
registration program does not violate the Due Process and Equal Protection Clauses of the Fourteenth
Amendment or the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution.
The Court also concludes that Plaintiff cannot recover on his state-law tort claims.

1 In reaching its conclusions, the Court sympathizes with Plaintiff and other patients who have a
2 choice to make regarding whether to disclose their identities in order to participate in the registration
3 program and whether to undergo the steps necessary to apply for and obtain a registration card.
4 Nevertheless, the judicial branch may not find the registration program unconstitutional “simply because
5 [it] might question the wisdom or necessity of the provision under scrutiny.” *Techtow v. City Council of*
6 *N. Las Vegas*, 105 Nev. 330, 333 (1989). Indeed, it is well established that “an act should not be
7 declared void because there may be a difference of opinion as to its wisdom.” *Damus v. Clark Cnty.*, 93
8 Nev. 512, 518 (1977).

9 Consequently, the Court may not judge the wisdom or necessity of the registration program
10 because the Court is not the policy maker. That constitutional function is assigned to the people’s
11 elected representatives in the Legislature. The Court’s constitutional function is to determine whether
12 the policy determinations made by the Legislature in the laws governing the registration program result
13 in any of the constitutional violations alleged in Plaintiff’s complaint. Having found no such
14 constitutional violations, the Court’s judicial review is at an end, and the Court may not judge the
15 wisdom or necessity of the registration program because “matters of policy or convenience or right or
16 justice or hardship or questions of whether the legislation is good or bad are solely matters for
17 consideration of the legislature and not of the courts.” *King v. Bd. of Regents*, 65 Nev. 533, 542 (1948).
18 Therefore, given the Court’s order and judgment in this case, the best avenue of redress is through the
19 Legislature, not the courts.

20 PROCEDURAL BACKGROUND

21 **A. Parties and claims.**

22 On August 13, 2015, Plaintiff John Doe filed a class action complaint, on his own behalf and on
23 behalf of a class of those similarly situated, against Defendants State of Nevada ex rel. the Legislature of
24 the State of Nevada (Legislature), the Department of Health and Human Services (Department) and the

1 Honorable Brian Sandoval in his official capacity as Governor of the State of Nevada (Governor). On
2 August 20, 2015, Plaintiff filed a first amended class action complaint pursuant to NRCP 15(a), and on
3 September 21, 2015, Plaintiff filed a second amended class action complaint pursuant to a stipulation
4 and order approved by the Court on September 23, 2015. In his second amended complaint, Plaintiff
5 alleges state-law tort claims, federal constitutional claims and a state constitutional claim relating to the
6 validity and operation of the provisions of Nevada's medical marijuana laws which establish the
7 registration program and prescribe procedures and fees to apply for and obtain a registration card.

8 Plaintiff states that he brought this action under the pseudonym "John Doe" to protect his identity
9 due to the sensitivity of the issues. (Compl. p.2 n.1.)¹ Plaintiff alleges that he is a resident of the City of
10 Las Vegas and Clark County, Nevada, that he is a 42-year-old male who has a history of severe migraine
11 headaches and associated side effects, such as photophobia and nausea, and that he has tried all the
12 traditional medical treatments for his migraines but those treatments do not resolve the severe nausea
13 and other associated side effects of the migraines. (Compl. ¶¶ 1, 11-15.) Plaintiff alleges that his
14 physician has recommended that he use medical marijuana to treat his migraines and associated side
15 effects, that Plaintiff has used medical marijuana to treat his migraines and associated side effects and
16 that medical marijuana has been effective in resolving his migraines and associated side effects when no
17 other drug has been efficacious. (Compl. ¶¶ 16-18.)

18 Plaintiff alleges that he applied for his registration card from the Department, that he paid various
19 fees to receive his registration card, that he was issued a registration card that expired one year after its
20 issuance and that he renewed his registration card. (Compl. ¶¶ 22, 24-26.) Plaintiff alleges that when he
21 applied for his registration card, there were dozens of applications submitted to the Department from
22 companies that sought to operate medical marijuana dispensaries throughout the State but that Plaintiff
23 has not been able to access or use medical marijuana, despite having his registration card, because no

24 ¹ All parenthetical citations are to the Second Amended Complaint.

1 dispensaries have opened in Southern Nevada. (Compl. ¶¶ 23, 27-28.) Plaintiff alleges that, despite the
2 lack of access to medical marijuana in Southern Nevada, the Department repeatedly took his money and,
3 in return, issued him multiple registration cards. (Compl. ¶ 29.)

4 In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud
5 alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration
6 cards which were useless in facilitating access to medical marijuana because the Department knew or
7 should have known that no dispensaries would be open in Southern Nevada within the one-year period
8 covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a
9 state-law tort claim against the Department for unjust enrichment alleging that he never obtained any
10 benefit from the registration cards because the Department never licensed any dispensaries during the
11 period that the registration cards were valid and that the Department unjustly accepted and retained his
12 fees for the registration cards. (Compl. ¶¶ 58-62.)

13 In his third and fourth claims for relief, Plaintiff brings federal constitutional claims under the
14 federal civil rights statute, 42 U.S.C. § 1983, against all Defendants under the Due Process Clause and
15 Equal Protection Clause of the Fourteenth Amendment. Plaintiff alleges that because “[a]ccess to
16 healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in
17 America’s history and tradition,” the Due Process Clause recognizes and protects a substantive and
18 fundamental right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff
19 alleges that the registry and associated application process and fees impose an unnecessary, undue and
20 unreasonable burden and barrier on the exercise of a person’s fundamental right to access healthcare
21 recommended by a physician in violation of the Equal Protection Clause because the registry and
22 associated application process and fees apply only to persons who seek to use medical marijuana for
23 their medical condition but do not apply to similarly situated persons who seek to use any other medical
24 treatment for the same medical condition. (Compl. ¶¶ 80-101.)

1 In his fifth claim for relief, Plaintiff brings a federal constitutional claim under the federal civil
2 rights statute, 42 U.S.C. § 1983, against all Defendants under the Self-Incrimination Clause of the Fifth
3 Amendment. Plaintiff alleges that persons who register with the State under the medical marijuana laws
4 are compelled by state law to admit that they intend to use medical marijuana and that by making such
5 an admission, they are compelled to incriminate themselves in violation of the privilege against self-
6 incrimination protected by the Fifth Amendment because they are admitting that they are engaging in
7 acts illegal under federal law. (Compl. ¶¶ 104-110.)

8 Finally, in his sixth claim for relief, Plaintiff brings a state constitutional claim against the
9 Legislature and the Governor alleging that the fees paid for the registration cards violate the Uniform
10 and Equal Tax Clause of Article 10, Section 1(1) of the Nevada Constitution, which requires the
11 Legislature to provide for “a uniform and equal rate of assessment and taxation.” Plaintiff alleges that
12 the fees paid for the registration cards impose a de facto tax upon persons who seek to use medical
13 marijuana for their medical condition and that such a tax is non-uniform and unequal in its effect in
14 violation of the Uniform and Equal Tax Clause because the fees apply only to persons who seek to use
15 medical marijuana for their medical condition but do not apply to similarly situated persons who seek to
16 use any other medical treatment for the same medical condition.² (Compl. ¶¶ 116-117.)

17 **B. Dispositive motions.**

18 Pursuant to the stipulation and order approved by the Court on September 23, 2015, the parties
19 established a schedule for filing and briefing dispositive motions. The parties also agreed that if any
20 party filed a dispositive motion, no motion for class certification would be filed pursuant to NRCP 23(c)

21
22 ² In his opposition to the Legislature’s motion for summary judgment, Plaintiff conceded that the
23 Uniform and Equal Tax Clause applies only to property taxes, and Plaintiff requested to strike that
24 claim from his second amended complaint. (Pl.’s Opp’n & Counter-Mot. for Summ. Judgm’t at 47.)
At the hearing, Plaintiff conceded to dismissal of the claim. The Court finds dismissal is appropriate.
Therefore, the Court dismisses Plaintiff’s sixth claim for relief under the Uniform and Equal Tax
Clause and will not discuss it further.

1 until the Court enters a written order resolving each such dispositive motion.³ The parties filed and
2 briefed the following dispositive motions: (1) Plaintiff's motion for partial summary judgment under
3 NRCP 56 for judgment as a matter of law on his fifth claim for relief alleging violations of the Fifth
4 Amendment privilege against self-incrimination and Plaintiff's motion for a permanent injunction based
5 on that claim; (2) Plaintiff's counter-motion for summary judgment under NRCP 56 for judgment as a
6 matter of law on his third and fourth claims for relief alleging violations of due process and equal
7 protection under the Fourteenth Amendment; (3) the Department's motion to dismiss under
8 NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; (4) the Governor's motion
9 to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; and (5) the
10 Legislature's motion for summary judgment under NRCP 56 for judgment as a matter of law on all
11 causes of action and claims for relief alleged in Plaintiff's complaint.

12 On December 8, 2015, the Court held a hearing on the parties' dispositive motions, and the
13 following counsel appeared on behalf of the parties at the hearing: Jacob L. Hafter, Esq., of
14 HAFTERLAW, LLC, appeared on behalf of Plaintiff John Doe; Linda C. Anderson, Esq., Chief Deputy
15 Attorney General, appeared on behalf of Defendant State of Nevada ex rel. the Department; Gregory L.
16 Zunino, Esq., Chief Deputy Attorney General, appeared on behalf of Defendant State of Nevada ex rel.
17 the Governor; and Kevin C. Powers, Esq., Chief Litigation Counsel, Legislative Counsel Bureau, Legal
18 Division, appeared on behalf of Defendant State of Nevada ex rel. the Legislature.

21 ³ It is well established that a district court may rule on dispositive motions before a class certification
22 motion in order "to protect both the parties and the court from needless and costly further litigation."
23 *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984); *Ressler v. Clay Cnty.*, 375 S.W.3d 132, 137-38
24 (Mo. Ct. App. 2012) ("Since the Ninth Circuit's decision in *Schock*, numerous other federal courts
have held similarly, or have implicitly agreed with the rule of allowing dispositive proceedings as to
individual claims prior to determination of certification."); *Christensen v. Kiewit-Murdock Inv. Corp.*,
815 F.2d 206, 214 (2d Cir. 1987) (holding that it is within a district court's discretion to reserve
decision on a class certification motion pending disposition of a motion to dismiss).

1 In their dispositive motions, the parties have presented the Court with both motions to dismiss
2 under NRCP 12(b)(5) and motions for summary judgment under NRCP 56. As a general rule, the
3 standards for deciding motions to dismiss under NRCP 12(b)(5) are different from the standards for
4 deciding motions for summary judgment under NRCP 56. *See Witherow v. State Bd. of Parole*
5 *Comm'rs*, 123 Nev. 305, 307-08 (2007). However, when a district court reviews a motion to dismiss
6 under NRCP 12(b)(5) and "matters outside the pleading[s] are presented to and not excluded by the
7 court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."
8 NRCP 12(b). In other words, "when the court considers matters outside the pleadings, the court must
9 treat the motion as one for summary judgment." *Witherow*, 123 Nev. at 307.

10 In this case, Plaintiff presented matters outside the pleadings by attaching a copy of the Nevada
11 Division of Public and Behavioral Health Medical Marijuana Cardholder Application Packet
12 (application packet) as an exhibit to his motions for summary judgment and his oppositions to the
13 motions to dismiss. No party objected to the Court considering the application packet in reviewing the
14 motions to dismiss. Therefore, because matters outside the pleadings were presented to and not
15 excluded by the Court in reviewing the motions to dismiss, the Court must treat the motions to dismiss
16 as motions for summary judgment. *Witherow*, 123 Nev. at 307-08.

17 Accordingly, having considered the pleadings, documents and exhibits in this case and having
18 received the arguments of counsel for the parties, the Court rules on the dispositive motions as follows:
19 (1) the Court denies Plaintiff's motion for partial summary judgment, motion for permanent injunction
20 and counter-motion for summary judgment; (2) the Court grants the Department's motion to dismiss
21 which is being treated as a motion for summary judgment; (3) the Court grants the Governor's motion to
22 dismiss which is being treated as a motion for summary judgment; and (4) the Court grants the
23 Legislature's motion for summary judgment. Having considered all causes of action and claims for
24 relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court

1 concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and
2 claims for relief, and the Court enters final judgment in favor of all Defendants. Because the Court
3 enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is
4 not required to determine whether this action can be maintained as a class action under NRCP 23(c).
5 Based on the Court's resolution of the dispositive motions, the Court enters the following findings of
6 fact, conclusions of law and order and judgment pursuant to NRCP 52, 56 and 58.

7 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

8 **A. History and overview of Nevada's medical marijuana laws.**

9 In 2000, Nevada's voters approved a constitutional initiative adding Article 4, Section 38 to the
10 Nevada Constitution which directs the Legislature to provide by law for the use of medical marijuana
11 recommended by a physician for the treatment and alleviation of certain chronic or debilitating medical
12 conditions. In full, Article 4, Section 38 provides:

13 1. The legislature shall provide by law for:

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

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

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

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

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

22 2. This section does not:

23 (a) Authorize the use or possession of the plant for a purpose other than medical or use for a
medical purpose in public.

24 (b) Require reimbursement by an insurer for medical use of the plant or accommodation of
medical use in a place of employment.

1 According to the ballot materials presented to the voters, “[t]he initiative is an attempt to balance
2 the needs of patients with the concerns of society about marijuana use.” *State of Nevada Ballot*
3 *Questions 2000, Question No. 9* (Nev. Sec’y of State). As part of that balance, the voters were told that
4 “[a] confidential registry of authorized users shall be created and available to law enforcement agencies
5 to verify a claim of authorization,” and that with such “safeguards included to protect the concerns of
6 society, this proposal can make a difference in the lives of thousands of persons suffering from these
7 serious illnesses.” *Id.*

8 Considering the plain language of the initiative in conjunction with the information provided to
9 the voters, the Court finds that the drafters and voters intended for the registry to operate as a central
10 component of the initiative because when they authorized a patient’s use of medical marijuana upon the
11 recommendation of a physician, they also made the use of medical marijuana expressly subject to the
12 initiative’s provisions regarding the patient registry. Furthermore, under well-established rules of
13 constitutional construction, the constitutional provisions regarding the patient’s right to use medical
14 marijuana stand on equal footing with the constitutional provisions regarding the patient registry, and
15 none of the constitutional provisions take precedence over nor exist independently of the other
16 constitutional provisions. *See Nevadans for Nev. v. Beers*, 122 Nev. 930, 944 (2006). Rather, each
17 constitutional provision of the initiative must be read together as a whole, so as to give effect to and
18 harmonize each provision *in pari materia* or in conjunction with each other provision. *Nevadans for*
19 *Nev.*, 122 Nev. at 944 (“The Nevada Constitution should be read as a whole, so as to give effect to and
20 harmonize each provision.”); *State of Nev. Employees Ass’n v. Lau*, 110 Nev. 715, 718 (1994) (stating
21 that when interpreting constitutional provisions “it is necessary to use canons of construction, and to
22 give effect to all controlling legal provision[s] *in pari materia*.”).

23 Reading the constitutional provisions of the initiative together as a whole, the Court finds that the
24 initiative was not intended to create an unconditional or absolute right to use medical marijuana upon the

1 recommendation of a physician. To the contrary, the Court finds that the initiative was drafted to
2 impose conditions and restrictions on the use of medical marijuana recommended by a physician in
3 order to safeguard the concerns of society about marijuana use. To this end, the initiative expressly
4 directs the Legislature to provide by law for: (1) “[a] registry of patients, and their attendants, who are
5 authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify
6 a claim of authorization and which is otherwise confidential”; and (2) “[a]uthorization of appropriate
7 methods for supply of the plant to patients authorized to use it.” Nev. Const. art. 4, § 38(1). Thus, the
8 Court finds that although the initiative directs the Legislature to provide by law for the use of medical
9 marijuana recommended by a physician, it invests the Legislature with the power to determine, as a
10 matter of public policy, the appropriate methods to implement and carry out the conditions and
11 restrictions on the use of medical marijuana authorized by the initiative.

12 In 2001, the Legislature exercised its power under the initiative by passing A.B. 453 which
13 established Nevada’s laws, codified in NRS Chapter 453A, regulating the use of medical marijuana.
14 A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. As required by the initiative, the Legislature
15 created a registry of patients, and their attendants, who are authorized to use medical marijuana and
16 established procedures for a person to apply for a registration card that identifies the person as exempt
17 from state prosecution for engaging in the medical use of marijuana in accordance with law. *Id.*

18 The Legislature modeled Nevada’s laws governing the registration program on the Oregon
19 Medical Marijuana Act of 1999 (Oregon Act). *Hearing on A.B. 453 before Assembly Comm. on*
20 *Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Since the Oregon Act’s enactment in 1999, it has authorized
21 only persons holding a valid registration card to use medical marijuana. *See* 1999 Or. Laws, ch. 4, § 4 &
22 ch. 825, § 2 (enacting Or. Rev. Stat. § 475.309); *Emerald Steel Fabricators v. Bureau of Labor &*
23 *Indus.*, 230 P.3d 518, 519 (Or. 2010) (“The Oregon Medical Marijuana Act authorizes persons holding a
24 registry identification card to use marijuana for medical purposes.”).

1 During hearings in the Nevada Assembly on A.B. 453, the bill's primary sponsor,
2 Assemblywoman Giunchigliani, testified that "[t]he Oregon model would be adopted regarding
3 registered cardholders being allowed to have a certain number of plants and quantity of useable
4 marijuana," and that "[f]ollowing the Oregon model was a good choice." *Hearing on A.B. 453 before*
5 *Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 12, 2001). She also testified that the registration
6 program "maintained the safety and integrity of the measure the [voters] signed." *Hearing on A.B. 453*
7 *before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Before the bill was passed by the
8 Assembly, Ms. Giunchigliani stated to the body that "I think the public knew very well what they voting
9 on and recognized that under extreme medical conditions, they supported the issue of a registry card and
10 allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23,
11 2001). During hearings in the Nevada Senate, Ms. Giunchigliani emphasized that "only those who are
12 registered are eligible for the program." *Hearing on A.B. 453 before Sen. Comm. on Human Res. &*
13 *Facilities*, 71st Leg. (Nev. June 3, 2001).

14 When the Legislature passed A.B. 453, it explained in the preamble that it intended for the bill to
15 "carry out the will of the people of this state and to regulate the health, medical practices and well-being
16 of those people in a manner that respects their personal decisions concerning the relief of suffering
17 through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053.
18 However, the Legislature also explained that it was enacting the registration program because "[m]any
19 residents of this state have suffered the negative consequences of abuse of and addiction to marijuana,
20 and it is important for the legislature to ensure that the program established for the distribution and
21 medical use of marijuana is designed in such a manner as not to harm the residents of this state by
22 contributing to the general abuse of and addiction to marijuana." *Id.* Thus, like the drafters of the
23 initiative, the Legislature intended for A.B. 453 to balance the needs of patients with the concerns of
24 society about marijuana use. To achieve that balance, the Legislature made a patient's use of medical

1 marijuana expressly subject to the medical marijuana laws regulating a patient's participation in the
2 registration program. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66.

3 As enacted in 2001, the medical marijuana laws provided that holders of valid registration cards
4 were not allowed to possess, deliver or produce, at any one time, more than: (1) one ounce of usable
5 marijuana; (2) three mature marijuana plants; and (3) four immature marijuana plants. A.B. 453, 2001
6 Nev. Stat., ch. 592, § 17, at 3055-56 (enacting NRS 453A.200). At the time, the Department of
7 Agriculture was charged with administering and enforcing the laws governing the registry and
8 registration cards. *Id.* § 19, at 3056-57 (enacting NRS 453A.210). However, the Department of
9 Agriculture was not authorized by A.B. 453 to impose fees to carry out the registration program.

10 In 2003, the Legislature authorized the Department of Agriculture to impose fees to defray the
11 costs of servicing the registration program, but the Legislature capped the fees at \$50 for obtaining an
12 application for a registration card and \$150 for processing and issuing a registration card. 2003 Nev.
13 Stat., ch. 281, § 8, at 1434-35 (amending NRS 453A.740). When the Legislature authorized the fees in
14 2003, the Acting Director of the Department of Agriculture, Don Henderson, testified regarding the need
15 for the fees to defray the costs of servicing the registration program:

16 Mr. Henderson explained that during the 2001 session the Legislature had implemented the
17 Nevada Medical Marijuana Program without fee authority. The Department of Agriculture
18 had taken direction from the Legislature and started the program in October 2001.
19 Mr. Henderson stated it had been a successful program with approximately 300 participants.
20 After one and a half years in the program, the Department had discovered a number of issues
21 that needed revising. *The program also generated an expense to the Department.*

22 In A.B. 503 some technical amendments had been proposed to the bill . . . A.B. 503 had
23 passed through Committee, appeared to be doing well, and then died on the Floor.
24 Mr. Henderson requested that if there was an interest, there were three key provisions in
A.B. 503 that the Committee might add to A.B. 130. . . . *Section 12 of A.B. 503 would
establish the fee authority for the Department of Agriculture to recover administrative costs
for this program.*

Mr. Henderson commented that the Department could probably handle the technical issues
involved with the Medical Marijuana Program; however, *the Department would be unable to
continue to service the program if fee authority was not granted.*

1 *Hearing on A.B. 130 before Assembly Comm. on Ways & Means, 72d Leg. (Nev. May 12, 2003)*
2 (emphasis added).

3 In 2009, the Legislature transferred administration and enforcement of the registration program to
4 the Health Division of the Department of Health and Human Services. 2009 Nev. Stat., ch. 170, at 617-
5 28. The Administrator of the Division is the state officer who is charged with administering and
6 enforcing the laws governing the registration program, subject to the administrative supervision of the
7 Director of the Department. NRS 232.320; NRS 232.340; NRS 453A.210; NRS 453A.730;
8 NRS 453A.740. In 2013, the Legislature changed the name of the Health Division to the Division of
9 Public and Behavioral Health (Division). 2013 Nev. Stat., ch. 489, § 127, at 3062 (amending
10 NRS 453A.090).

11 Also in 2013, the Legislature substantially revised the medical marijuana laws. 2013 Nev. Stat.,
12 ch. 547, at 3700-26. Under the 2013 revisions, the Legislature authorized the operation of medical
13 marijuana dispensaries that must register with the Division to sell or dispense medical marijuana to
14 holders of valid registration cards. *Id.* §§ 3-23, at 3700-24. The Legislature also provided that holders
15 of valid registration cards are not allowed to possess, deliver or produce, at any one time, more than:
16 (1) two and one-half ounces of usable marijuana in any one 14-day period; (2) twelve marijuana plants,
17 irrespective of whether the marijuana plants are mature or immature; and (3) a maximum allowable
18 quantity of edible marijuana products and marijuana-infused products as established by regulation of the
19 Division. *Id.* § 22, at 3716-17 (amending NRS 453A.200). In addition, the Legislature provided that
20 after a medical marijuana dispensary opens in the county of residence of the holder of a valid
21 registration card, the holder or his or her primary caregiver are not authorized to cultivate, grow or
22 produce marijuana unless one of the following exceptions apply:

23 (1) The holder or his or her primary caregiver was cultivating, growing or producing
marijuana in accordance with NRS Chapter 453A on or before July 1, 2013;

24 (2) All the medical marijuana dispensaries in the county of residence of the holder or his
or her primary caregiver close or are unable to supply the quantity or strain of marijuana

1 necessary for the medical use of the patient to treat his or her specific medical condition;

2 (3) Because of illness or lack of transportation, the holder and his or her primary
3 caregiver are unable reasonably to travel to a medical marijuana dispensary; or

4 (4) No medical marijuana dispensary was operating within 25 miles of the residence of
5 the holder at the time he or she first applied for his or her registration card.

6 *Id.* § 22, at 3716-17 (amending NRS 453A.200).

7 In the 2013 revisions, the Legislature also reduced the maximum fees chargeable by the Division
8 to \$25 for obtaining an application for a registration card and \$75 for processing and issuing a
9 registration card. *Id.* § 24, at 3725 (amending NRS 453A.740). By regulation, the Administrator of the
10 Division has set the fees at the maximum amounts allowed by law. NAC 453A.140.⁴

11 In 2015, the Legislature enacted further revisions to the medical marijuana laws that became
12 effective before Plaintiff filed his original complaint on August 13, 2015. *See* 2015 Nev. Stat., ch. 401,
13 §§ 29-34, at 2264-69 (effective July 1, 2015); 2015 Nev. Stat., ch. 495, §§ 1-3, at 2985-87 (effective
14 June 9, 2015, with certain exceptions not relevant here); 2015 Nev. Stat., ch. 506, §§ 11-36, at 3091-
15 3110 (effective July 1, 2015). As a general rule, when courts evaluate a facial constitutional claim, they
16 ordinarily review the facial validity of the challenged statute “as it now stands, not as it once did.” *Hall*
17 *v. Beals*, 396 U.S. 45, 48 (1969); *Fusari v. Steinberg*, 419 U.S. 379, 379-87 (1975); *Princeton Univ. v.*
18 *Schmid*, 455 U.S. 100, 103 (1982). Consequently, it is usually the current version of the challenged
19 statute that is applicable to a facial constitutional claim. *See, e.g., Deja Vu Showgirls of Las Vegas v.*
20 *Nev. Dep’t of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 395-96 (2014) (reviewing the most
21 recently amended version of the challenged statute in a facial constitutional claim, including statutory
22 amendments made after the complaint was filed). Therefore, because the 2015 version is the current

23 ⁴ All citations to the Division’s regulations codified in NAC Chapter 453A are to the version that
24 became effective on April 1, 2014. On December 18, 2015, the Division proposed amendments to its
regulations. *See Proposed Regulation of Div. of Pub. and Behav’l Health of Dep’t of Health and*
Human Servs., LCB File No. R148-15 (Dec. 18, 2015). However, those proposed amendments will
not become effective until the Division completes the regulation-making process prescribed by the
Nevada Administrative Procedure Act in NRS Chapter 233B. Therefore, those proposed amendments
are not relevant to the Court’s disposition of this matter.

1 version of the medical marijuana laws and because the 2015 version was in effect when Plaintiff filed
2 his original complaint, the Court will apply the 2015 version of the medical marijuana laws when
3 reviewing Plaintiff's facial constitutional claims.⁵

4 To apply for a registration card under the medical marijuana laws, an applicant must pay a fee of
5 \$25 to obtain an application packet from the Division. NRS 453A.740; NAC 453A.140(1). To
6 complete the application packet, the applicant must provide certain identification, background and health
7 information and submit certain verifying documentation to the Division, including: (1) the name,
8 address, telephone number, social security number and date of birth of the applicant; (2) proof that the
9 applicant is a resident of Nevada, including, without limitation, a photocopy of a driver's license or
10 identification card issued by the Department of Motor Vehicles; (3) the name, address and telephone
11 number of the applicant's attending physician; (4) a written statement signed by the applicant's
12 attending physician stating that the applicant has been diagnosed with a chronic or debilitating medical
13 condition, the medical use of marijuana may mitigate the symptoms or effects of that condition and the
14 attending physician has explained the possible risks and benefits of the medical use of marijuana; (5) if
15 the applicant elects to designate a primary caregiver, the name, address, telephone number and social
16 security number of the designated primary caregiver and a written statement signed by the applicant's
17 attending physician approving of the designation of the primary caregiver; and (6) a written statement
18 signed by the applicant's attending physician verifying that the attending physician was presented with
19 photographic identification of the applicant and any designated primary caregiver and that the applicant
20 and any designated primary caregiver are the persons named in the application. NRS 453A.210(2);
21 NAC 453A.100(1).

22
23 ⁵ Under the 2015 version of the medical marijuana laws, there are specific provisions that apply only to
24 applicants who are minors and to their custodial parents or legal guardians. Because Plaintiff is not a
minor and because Plaintiff does not allege that he is a custodial parent or legal guardian of an
applicant who is a minor, the Court does not need to discuss those specific provisions.

1 In addition, the applicant must sign an acknowledgment form and a medical marijuana program
2 waiver and liability release form that are prescribed by the Division, and the applicant must provide any
3 information required by the Department of Motor Vehicles which prepares and issues the registration
4 card if the application is approved by the Division. NRS 453A.740(1); NAC 453A.100(1);
5 NAC 453A.110(1).

6 The applicant also must submit to the Division any information required by the Central Repository
7 for Nevada Records of Criminal History (Central Repository) to determine the criminal history of the
8 applicant and any designated primary caregiver. NRS 453A.210(4); NAC 453A.100(1)-(2). The
9 Division must submit a copy of the application to the Central Repository which must report to the
10 Division its findings as to the criminal history of the applicant and any designated primary caregiver
11 within 15 days after receiving a copy of the application. NRS 453A.210(4); NAC 453A.100(2). The
12 Division may deny the application if the applicant and any designated primary caregiver has been
13 convicted of knowingly or intentionally selling a controlled substance. NRS 453A.210(5).

14 The Division also must submit a copy of the application to the State Board of Medical Examiners,
15 if the attending physician is licensed to practice medicine under NRS Chapter 630, or the State Board of
16 Osteopathic Medicine, if the attending physician is licensed to practice osteopathic medicine under NRS
17 Chapter 633. NRS 453A.210(4). Within 15 days after receiving a copy of the application, the licensing
18 board must report to the Division its findings as to whether the attending physician is licensed to
19 practice medicine in this State and whether the attending physician is in good standing.
20 NRS 453A.210(4). The Division may deny the application if the attending physician is not licensed to
21 practice medicine in this State or is not in good standing. NRS 453A.210(5).

22 The Division also may deny the application if: (1) the applicant fails to provide the information
23 required to establish the applicant's chronic or debilitating medical condition or document the
24 applicant's consultation with an attending physician regarding the medical use of marijuana in

1 connection with that condition; (2) the applicant fails to comply with regulations adopted by the
2 Division; (3) the Division determines that the information provided by the applicant was falsified;
3 (4) the Division has prohibited the applicant from obtaining or using a registration card under
4 NRS 453A.300(2) because the Division has determined that the applicant has willfully violated a
5 provision of NRS Chapter 453A or any regulation adopted by the Division to carry out that chapter; or
6 (5) the Division determines that the applicant or the applicant's designated primary caregiver has had a
7 registration card revoked pursuant to NRS 453A.225. NRS 453A.210(5).

8 If the Division approves the application, the applicant must pay a fee of \$75 for the processing and
9 issuance of the registration card. NRS 453A.740; NAC 453A.140(2). The applicant also must pay any
10 fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an identification
11 card by the Department of Motor Vehicles. NRS 453A.740; NAC 453A.110(1). The registration card is
12 valid for a period of 1 year, and it may be renewed in accordance with the regulations adopted by the
13 Division and the payment of a fee of \$75 for the processing and issuance of the renewed registration
14 card and any fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an
15 identification card by the Department of Motor Vehicles. NRS 453A.220(5); NRS 453A.740;
16 NAC 453A.110(1); NAC 453A.130; NAC 453A.140(2).

17 Finally, the medical marijuana laws require the Division to protect the confidentiality of
18 information, documents and communications provided to the Division by applicants and information
19 that is part of the registration program as follows:

20 1. Except as otherwise provided in this section, NRS 239.0115 and subsection 4 of NRS
21 453A.210, the Division shall not disclose:

22 (a) The contents of any tool used by the Division to evaluate an applicant or its affiliate.

23 (b) Any information, documents or communications provided to the Division by an
24 applicant or its affiliate pursuant to the provisions of this chapter, without the prior written
consent of the applicant or affiliate or pursuant to a lawful court order after timely notice of
the proceedings has been given to the applicant or affiliate.

(c) The name or any other identifying information of:

(1) An attending physician; or

(2) A person who has applied for or to whom the Division or its designee has issued a

1 registry identification card or letter of approval.

2 ➔ Except as otherwise provided in NRS 239.0115, the items of information described in this
3 subsection are confidential, not subject to subpoena or discovery and not subject to
4 inspection by the general public.

5 2. Notwithstanding the provisions of subsection 1, the Division or its designee may
6 release the name and other identifying information of a person to whom the Division or its
7 designee has issued a registry identification card or letter of approval to:

8 (a) Authorized employees of the Division or its designee as necessary to perform official
9 duties of the Division; and

10 (b) Authorized employees of state and local law enforcement agencies, only as necessary
11 to verify that a person is the lawful holder of a registry identification card or letter of
12 approval issued to him or her pursuant to NRS 453A.220 or 453A.250.

13 NRS 453A.700 (2015). With this history and overview of Nevada's medical marijuana laws in mind,
14 the Court will address each of Plaintiff's remaining claims for relief.

15 **B. Standards of review.**

16 As discussed previously, Plaintiff and the Legislature have filed motions for summary judgment,
17 and the Department and the Governor have filed motions to dismiss which the Court must treat as
18 motions for summary judgment under NRCP 12(b) because matters outside the pleadings were
19 presented to and not excluded by the Court. *See Witherow v. State Bd. of Parole Comm'rs*, 123 Nev.
20 305, 307-08 (2007). Therefore, the standards of review that apply to motions for summary judgment
21 govern the parties' dispositive motions. *Id.*

22 A party is entitled to summary judgment under NRCP 56 when the allegations in the pleadings
23 and evidence in the record "demonstrate that no genuine issue of material fact exists, and the moving
24 party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731 (2005). The
purpose of granting summary judgment "is to avoid a needless trial when an appropriate showing is
made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment
as a matter of law." *McDonald v. D.P. Alexander*, 121 Nev. 812, 815 (2005) (quoting *Coray v. Hom*, 80
Nev. 39, 40-41 (1964)).

A party is also entitled to summary judgment when the claims against the party are barred as a

1 matter of law by one or more affirmative defenses. *See Williams v. Cottonwood Cove Dev.*, 96 Nev.
2 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits
3 prosecution of the claims against the party even if all allegations in the complaint are true. *Douglas*
4 *Disposal v. Wee Haul*, 123 Nev. 552, 557-58 (2007). Such affirmative defenses include the statute of
5 limitations and sovereign immunity. *See* NRCP 8(c); *Boulder City v. Boulder Excavating*, 124 Nev.
6 749, 754-55 (2008); *Kellar v. Snowden*, 87 Nev. 488, 491-92 (1971).

7 In addition, as a general rule, when the plaintiff pleads claims that a state statute is
8 unconstitutional, the plaintiff's claims present only issues of law which are matters purely for the Court
9 to decide and which may be decided on summary judgment where no genuine issues of material fact
10 exist and the record is adequate for consideration of the constitutional issues presented. *See Flamingo*
11 *Paradise Gaming v. Chanos*, 125 Nev. 502, 506-09 (2009) (affirming district court's summary judgment
12 regarding constitutionality of a statute and stating that "[t]he determination of whether a statute is
13 constitutional is a question of law."); *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 294-95 (1983)
14 (holding that a constitutional claim may be decided on summary judgment where no genuine issues of
15 material fact exist and the record is adequate for consideration of the constitutional issues presented).

16 Finally, in reviewing the constitutionality of statutes, the Court must presume the statutes are
17 constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the
18 constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated."
19 *List v. Whisler*, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to
20 make "a clear showing that the statute is unconstitutional." *Id.* at 138. As a result, the Court must not
21 invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable
22 doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870)
23 ("[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the
24 Constitution."). Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not

1 declare an act void because it disagrees with the wisdom of the Legislature.” *Anthony v. State*, 94 Nev.
2 337, 341 (1978). Thus, in reviewing the constitutionality of statutes, the Court must not be concerned
3 with the wisdom or policy of the statutes because “[q]uestions relating to the policy, wisdom, and
4 expediency of the law are for the people’s representatives in the legislature assembled, and not for the
5 courts to determine.” *Worthington v. Dist. Ct.*, 37 Nev. 212, 244 (1914).

6 **C. Federal constitutional claims for money damages.**

7 In his third, fourth and fifth claims for relief, Plaintiff asks for money damages on his federal
8 constitutional claims under 42 U.S.C. § 1983 (section 1983) against the State of Nevada ex rel. the
9 Legislature, the Department and the Governor acting in his official capacity. (Compl. ¶¶ 90, 102, 113.)
10 The Court finds that Defendants are entitled to judgment as a matter of law on Plaintiff’s federal
11 constitutional claims for money damages because the State and its agencies and officials acting in their
12 official capacities are absolutely immune from liability for money damages under section 1983.

13 To seek redress for an alleged violation of federal constitutional rights, a plaintiff must bring an
14 action under the federal civil rights statutes codified in section 1983. *Arpin v. Santa Clara Valley*
15 *Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (“[A] litigant complaining of a violation of a
16 constitutional right does not have a direct cause of action under the United States Constitution but must
17 utilize 42 U.S.C. § 1983.”). A civil rights action under section 1983 “must meet federal standards even
18 if brought in state court.” *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 259 (1998); *Will v. Mich.*
19 *Dep’t of State Police*, 491 U.S. 58, 66 (1989).

20 The United States Supreme Court has held that states and their officials acting in their official
21 capacities are not “persons” who are subject to suit under section 1983 and they may not be sued in state
22 courts for money damages under the federal civil rights statutes. *Will*, 491 U.S. at 62-71. Based on
23 *Will*, the Nevada Supreme Court has held that state agencies and entities also are not “persons” who are
24 subject to suit under section 1983 and they likewise may not be sued in state courts for money damages

1 under the federal civil rights statutes. *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 605 (2007)
2 (“The State of Nevada is not a ‘person’ for § 1983 purposes, and respondents are state entities. Thus,
3 respondents cannot be sued under § 1983.” (footnotes omitted)); *N. Nev. Ass’n Injured Workers v. State*
4 *Indus. Ins. Sys.*, 107 Nev. 108, 114-15 (1991) (“Because SIIS is a state agency, appellants’ cause of
5 action has failed to state a claim under the federal civil rights statutes against SIIS. The same must be
6 said for SIIS’s officers and employees to the extent the cause of action seeks to impose liability for
7 actions properly attributable to their official capacities.”). Therefore, when a plaintiff’s complaint
8 alleges federal constitutional claims under section 1983 and asks for money damages from the State and
9 its agencies and officials acting in their official capacities, “the complaint fails to state an actionable
10 claim.” *N. Nev. Ass’n Injured Workers*, 107 Nev. at 114.

11 In his briefing, Plaintiff conceded that he cannot seek money damages under section 1983 against
12 the State, the Legislature and the Governor acting in his official capacity. (Pl.’s Opp’n & Counter-Mot.
13 for Summ. Judgm’t at 8 (“Plaintiff is not seeking monetary damages from the Legislature under these
14 claims.”)); (Pl.’s Opp’n to Gov.’s Mot. to Dismiss at 4 (“This case does not seek money from the
15 Governor[.]”)) Nevertheless, Plaintiff argues that the Department is “analogous to a municipality, not
16 the State, allowing [the Department] to be held liable [for money damages] for purposes of § 1983.”
17 (Pl.’s Opp’n & Counter-Mot. for Summ. Judgm’t at 6.) To support his argument, Plaintiff contends that
18 the recovery of money damages against the Department would not affect the state treasury because
19 “[w]hile DHHS received funding from the State’s general fund, no state funds are used to fund the
20 marijuana program within DHHS.” *Id.*

21 The Court finds that the Department is not analogous to a municipality. Rather, based on the
22 Department’s treatment under state law, the Court finds that the Department is a state agency under all
23 the factors considered by courts in civil rights action under section 1983. To determine whether an
24 entity is a state agency for purposes of a civil rights action, courts first consider whether “a judgment

1 against the entity named as a defendant would impact the state treasury.” *Austin v. State Indus. Ins. Sys.*,
2 939 F.2d 676, 678 (9th Cir. 1991). If a court determines that a judgment against the entity would impact
3 the state treasury, the entity is deemed a state agency as a matter of law, and it is absolutely immune
4 from liability for money damages under section 1983 as a matter of law. *Id.* at 679 (“a determination
5 that a judgment necessarily would have an impact on the state treasury would lead ineluctably to the
6 conclusion that [the entity] is a state agency.”).

7 In addition, even if a judgment against the entity would not necessarily have an impact on the state
8 treasury, the entity still may be deemed a state agency if the entity is treated as a state agency under state
9 law. *Id.* In making this determination, courts consider several factors, including: (1) the extent to which
10 the entity is subject to governmental control and review by the legislative and executive branches;
11 (2) the nature of the governmental powers delegated to the entity, such as the powers to conduct
12 administrative hearings and adjudications and to issue regulations carrying the force of law; (3) whether
13 the entity may sue or be sued on its own behalf or whether it must sue or be sued only in its official
14 capacity on behalf of the State; and (4) whether the entity may hold property on its own behalf or
15 whether it must hold property only on behalf of the State. *Id.* at 678-79. When “evaluating the force of
16 these factors in a particular case, [courts] look to state law’s treatment of the entity.” *Id.* at 678.

17 Based on the Department’s treatment under state law, the Court finds that the Department is a state
18 agency under all these factors. First, the Court finds that a judgment against the Department would
19 impact the state treasury because the money collected as fees under the medical marijuana registration
20 program is state money that is deposited in and drawn from the state treasury only pursuant to
21 appropriations made by law. As established by state law, the state treasury consists of all state money,
22 whether the money is deposited in the state general fund or another state fund. NRS 226.115;
23 NRS 353.249; NRS 353.321; NRS 353.323. State law requires the Administrator of the Division to
24 deposit all money collected as fees under the registration program in the state treasury. NRS 353.250;

1 NRS 353.253; NRS 453A.730. After the money is deposited in the state treasury, it is drawn from the
2 state treasury only pursuant to appropriations made by law to the Division to carry out the registration
3 program. NRS 453A.730; Nev. Const. art. 4, § 19 (“No money shall be drawn from the treasury but in
4 consequence of appropriations made by law.”).⁶ Thus, if Plaintiff recovered a judgment against the
5 Department for money damages under section 1983, the judgment would have an impact on the state
6 treasury because the judgment would be recovered from state money which is collected as fees under the
7 program and which is deposited in and drawn from the state treasury only pursuant to appropriations
8 made by law. For this reason alone, the Department is a state agency that may not be sued for money
9 damages under section 1983.

10 Furthermore, even assuming that a judgment against the Department would not have an impact on
11 the state treasury, the Department is still treated as a state agency under state law. The Department is
12 created by NRS 232.300, which is part of NRS Chapter 232, entitled “State Departments,” and NRS
13 Title 18, entitled “State Executive Department.” Thus, based on the codification of the Department’s
14 governing statutes in the provisions of NRS relating to the state executive branch, the Legislature
15 intended for the Department to function as a state agency of the executive branch. *See Coast Hotels &*
16 *Casinos v. Nev. State Labor Comm’n*, 117 Nev. 835, 841-42 (2001) (“The title of a statute may be
17 considered in determining legislative intent.”); *State ex rel. Masto v. Montero*, 124 Nev. 573, 577 n.8
18 (2008) (holding that the office of a district judge is a “state office” based on “several provisions in the
19 Nevada Revised Statutes [which] refer to ‘state office’ in the title and mention ‘state officer’ in the text
20 when explaining the provision.”).

21 ⁶ In 2015, the Legislature passed the Authorized Expenditures Act which authorizes the Division to
22 expend \$2,089,894 during Fiscal Year 2015-2016 and \$2,980,802 during Fiscal Year 2016-2017 for
23 the “Marijuana Health Registry.” A.B. 490, 2015 Nev. Stat., ch. 484, § 1, at 2859; *Hearing on A.B.*
24 *490 before Sen. Comm. on Fin.*, 78th Leg. (Nev. June 1, 2015) (“The Authorized Expenditures Act
provides authority to expend other monies not appropriated from the General Fund or Highway Fund.
Those other monies include federal funds, *self-funded fee generating budget accounts* and interagency
transfers.” (testimony of Mark Krmpotic, Senate Fiscal Analyst (emphasis added))).

1 As a state agency of the executive branch, the Department is subject to extensive governmental
2 control and review by the legislative and executive branches under Nevada state law. For example, the
3 Department is subject to the State Personnel System in NRS Chapter 284, the State Purchasing Act in
4 NRS Chapter 333 and the State Budget Act in NRS Chapter 353, and the Department is also subject to
5 legislative reviews of its budget and operations under NRS Chapter 218E and legislative audits of its
6 accounts, funds and other records under NRS Chapter 218G. The governmental powers delegated to the
7 Department also indicate that the Legislature intended for the Department to function as a state agency
8 of the executive branch because “[t]he Department is the sole agency responsible for administering the
9 provisions of law relating to its respective divisions.” NRS 232.300(3). Thus, the Department has been
10 charged with carrying out and enforcing laws enacted by the Legislature, and to execute its state
11 governmental functions, the Department has been given state governmental powers such as the powers
12 to conduct administrative hearings and adjudications and to issue regulations carrying the force of law.
13 See NRS 232.320; NRS Chapter 233B (APA); *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 298 & n.10
14 (2009) (“Under Article 5, Section 7 of the Nevada Constitution, the executive branch is charged with
15 carrying out and enforcing the laws enacted by the Legislature.”). Finally, the Department may not sue
16 or be sued on its own behalf, but it must sue or be sued only in its official capacity on behalf of the
17 State. See NRS 41.031; NRS 228.110; NRS 228.140; NRS 228.170. And the Department does not hold
18 property on its own behalf, but such property is held only on behalf of the State under NRS Chapter 331.

19 Consequently, based on the Department’s treatment under state law, the Court finds that the
20 Department is a state agency that may not be sued for money damages under section 1983.
21 Accordingly, the Court concludes that all Defendants are entitled to judgment as a matter of law on
22 Plaintiff’s federal constitutional claims for money damages because the State and its agencies and
23 officials acting in their official capacities are absolutely immune from liability for money damages under
24 section 1983.

1 **D. Federal constitutional claims for declaratory and injunctive relief.**

2 In his third, fourth and fifth claims for relief, Plaintiff asks for declaratory relief on his federal
3 constitutional claims under section 1983 against the State of Nevada ex rel. the Legislature, the
4 Department and the Governor acting in his official capacity. (Compl. ¶¶ 89-90, 101-102, 112-113.) In
5 his motion for partial summary judgment and motion for permanent injunction, Plaintiff also asks for
6 injunctive relief on his Fifth Amendment federal constitutional claim under section 1983 against the
7 same Defendants. (Pl.'s Mot. for Partial Summ. Judgm't at 16-17.) The Court finds that Defendants are
8 entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief
9 and injunctive relief because Plaintiff has not sued the proper state official, in this case the
10 Administrator of the Division, who is charged by state law with enforcing the medical marijuana laws
11 governing the registration program.

12 As a preliminary matter, the Court finds that Plaintiff cannot obtain declaratory relief or injunctive
13 relief against the State and its agencies, in this case the Legislature and the Department, because the
14 State and its agencies are not "persons" subject to a civil rights action under section 1983. *Allah v.*
15 *Comm'r of Dep't Corr. Servs.*, 448 F. Supp. 1123, 1125 (N.D.N.Y. 1978) ("It is well established that
16 state agencies are not 'persons' for purposes of the Civil Rights Acts. This is true whether the relief
17 being sought is injunctive and declaratory relief or damages."); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't*
18 *Nat. Res.*, 461 F. Supp. 2d 666, 671 (N.D. Ill. 2006) ("[T]here is no support for the proposition that
19 claims for injunctive relief may be brought under § 1983 against state agencies."). Therefore, the Court
20 concludes that the State and the Legislature and the Department are entitled to judgment as a matter of
21 law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief under
22 section 1983.

23 Plaintiff contends that he sued the proper state official because the Governor serves as the
24 organizational head of the Department and has ultimate responsibility for the Department's

1 administration of the registration program. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 6-7.)
2 Alternatively, Plaintiff asks for leave to amend his complaint to add the Director of the Department in
3 his official or personal capacity as a Defendant to the federal constitutional claims.⁷ (Pl.'s Opp'n &
4 Counter-Mot. for Summ. Judgm't at 7-8.)

5 The Court finds that Plaintiff cannot obtain declaratory or injunctive relief against the Governor or
6 the Director under section 1983 because the Governor and the Director do not have a sufficiently direct
7 connection under state law with the enforcement of the medical marijuana laws. The Court also denies
8 Plaintiff leave to amend his complaint to substitute the Administrator of the Division as the proper state
9 official under section 1983 because leave to amend should not be granted when the proposed
10 amendment would be futile. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d
11 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). A proposed amendment may be deemed futile if the
12 plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Id.* The Court finds
13 that allowing Plaintiff to amend his complaint to substitute the Administrator as the proper state official
14 under section 1983 would be futile because Plaintiff's federal constitutional claims do not state a
15 permissible or actionable claim on their merits as a matter of law.

16 As a general rule under *Ex parte Young*, 209 U.S. 123, 155-57 (1908), a plaintiff may bring
17 federal constitutional claims under section 1983 asking for prospective declaratory or injunctive relief
18 against state officials acting in their official capacities to enjoin their enforcement of allegedly
19 unconstitutional statutes. *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 952-53 (9th Cir.

21 ⁷ Although Plaintiff asks for leave to add the Director in his personal capacity, Plaintiff cannot sue a
22 state official for declaratory or injunctive relief under section 1983 in his personal capacity because a
23 claim for such equitable relief may be brought under section 1983 only against a state official in his
24 official capacity. *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 19 (D.D.C. 2007) ("there is no basis for
suing a government official for declaratory and injunctive relief in his or her individual or personal
capacity"); *Pascarella v. Swift Transp. Co.*, 643 F. Supp. 2d 639, 647 n.11 (D.N.J. 2009) ("the proper
vehicle for seeking equitable relief against a government official involving that officer's official duties
is an official capacity suit").

1 1983); *N. Nev. Ass'n Injured Workers v. State Indus. Ins. Sys.*, 107 Nev. 108, 115-16 (1991). However,
2 a plaintiff cannot bring claims under *Ex parte Young* for prospective declaratory or injunctive relief
3 against state officials unless the state officials have some direct connection under state law with the
4 enforcement of the challenged statutes. *Young*, 209 U.S. at 157; *Fitts v. McGhee*, 172 U.S. 516, 529-30
5 (1899); *L.A. Branch NAACP*, 714 F.2d at 952-53.

6 The connection necessary to trigger *Ex parte Young* “must be determined under state law
7 depending on whether and under what circumstances a particular defendant has a connection with the
8 challenged state law.” *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). The connection “must be
9 fairly direct; a generalized duty to enforce state law or general supervisory power over the persons
10 responsible for enforcing the challenged provision will not subject an official to suit.” *L.A. County Bar*
11 *Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). For example, when state law makes enforcement of the
12 challenged statutes the responsibility of state officials other than the Governor, neither the Governor’s
13 general executive power to see that the laws are faithfully executed, nor the Governor’s general
14 executive power to appoint or supervise those other state officials, will subject the Governor to suit
15 under *Ex parte Young* because the Governor will not have a sufficiently direct connection with the
16 enforcement of the challenged statutes. *Women’s Emergency Network v. Bush*, 323 F.3d 937, 949-50
17 (11th Cir. 2003); *Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002); *Confederated Tribes*
18 *& Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999); *L.A. Branch NAACP*,
19 714 F.2d at 952-53; *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979).

20 Because statutory enforcement powers are created by the Legislature, it is within the province of
21 the Legislature to determine which state agency or officer will exercise those statutory enforcement
22 powers and in what manner. See 16A Am. Jur. 2d *Constitutional Law* § 288 (2009) (“the legislature has
23 constitutional power to allocate executive department functions and duties among the offices,
24 departments, and agencies of state government.”). If the Legislature grants statutory enforcement

1 powers to a state agency or officer other than the Governor, the exercise of those statutory enforcement
2 powers by the state agency or officer is not subject to the Governor's direct control unless the
3 Legislature expressly gives the Governor statutory authority to exercise such control. *See Kendall v.*
4 *United States*, 37 U.S. 524, 610 (1838) (holding that Congress may "impose upon any executive officer
5 any duty [it] may think proper . . . and in such cases, the duty and responsibility grow out of and are
6 subject to the control of the law, and not to the direction of the President."); *Brown v. Barkley*, 628
7 S.W.2d 616, 623 (Ky. 1982) ("[W]hen the General Assembly has placed a function, power or duty in
8 one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives
9 him that authority.").

10 In enacting the medical marijuana laws, the Legislature did not grant statutory enforcement
11 powers to the Governor or the Director of the Department. Rather, the Legislature granted those powers
12 to the Administrator of the Division who is responsible for administering and enforcing the laws
13 governing the registration program. NRS 453A.210; NRS 453A.730; NRS 453A.740. The Legislature
14 did not expressly give the Governor or the Director statutory authority to exercise direct control over the
15 Administrator's enforcement of those laws. As a result, the Governor and the Director do not have a
16 sufficiently direct connection under state law with the enforcement of the medical marijuana laws.
17 Furthermore, even though the Director has general supervisory power over the Administrator under
18 NRS Chapter 232, it is the Administrator, not the Director, who is responsible for enforcing the medical
19 marijuana laws under NRS Chapter 453A.⁸ Therefore, because the Director has only general
20 supervisory power over the Administrator and because it is the Administrator, not the Director, who is
21 charged by state law with enforcing the medical marijuana laws, the Court finds that it is the

22 ⁸ Under NRS 232.320, the Director appoints the Administrator with the consent of the Governor, and
23 the Director administers, "through the divisions of the Department," the provisions of law "relating to
24 the functions of the divisions of the Department." Under NRS 232.340, the Administrator "[s]hall
administer the provisions of law relating to his or her division, subject to the administrative
supervision of the Director."

1 Administrator who is the proper state official to sue for declaratory and injunctive relief under
2 section 1983. Consequently, the Court concludes that Defendants are entitled to judgment as a matter of
3 law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief because
4 Plaintiff has not sued the proper state official—the Administrator of the Division—who is charged by
5 state law with enforcing the medical marijuana laws.⁹

6 When a plaintiff fails to sue the proper state official in a section 1983 action, the district court may
7 permit the plaintiff to amend his complaint to add the proper state official as a party-defendant unless
8 the proposed amendment would be futile. *See Cobb v. U.S. Dep't of Educ.*, 487 F. Supp. 2d 1049, 1055
9 (D. Minn. 2007). A proposed amendment may be deemed futile if the plaintiff seeks to amend the
10 complaint in order to plead an impermissible claim. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev.
11 Adv. Op. 42, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). As discussed next, the Court
12 finds that Plaintiff's federal constitutional claims do not state a permissible or actionable claim on their
13 merits as a matter of law. Therefore, the Court denies Plaintiff leave to amend his complaint to
14 substitute the Administrator of the Division as the proper state official under section 1983 because such
15 a proposed amendment would be futile.

16 E. Fourteenth Amendment claims.

17 In his third and fourth claims for relief, Plaintiff alleges that because “[a]ccess to healthcare and,
18 more specifically, medical treatments recommended by a physician are deeply rooted in America’s
19 history and tradition,” the Due Process Clause recognizes and protects a substantive and fundamental
20 right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff alleges that the
21 registry and associated application process and fees impose an unnecessary, undue and unreasonable
22

23 ⁹ Because Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional
24 claims for money damages and for declaratory and injunctive relief under section 1983, Plaintiff
cannot recover costs or attorney's fees under 42 U.S.C. § 1988 against Defendants as a matter of law.
Farrar v. Hobby, 506 U.S. 103, 109 (1992); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

1 burden and barrier on the exercise of a person's fundamental right to access healthcare recommended by
2 a physician in violation of the Equal Protection Clause because the registry and associated application
3 process and fees apply only to persons who seek to use medical marijuana for their medical condition
4 but do not apply to similarly situated persons who seek to use any other medical treatment for the same
5 medical condition. (Compl. ¶¶ 80-101.)

6 The Court finds that there is no fundamental right under federal law to use medical marijuana. *See*
7 *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) (holding that "federal law does not recognize a
8 fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating
9 pain and human suffering.").¹⁰ Moreover, the fact that medical use of marijuana is still illegal at the
10 federal level weighs against such use being a fundamental right under federal law. *See Gonzales v.*
11 *Raich*, 545 U.S. 1, 13-15 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-
12 92 (2001). At this time, medical use of marijuana is only an allowable legal option under state law.
13 Article 4, Section 38 of the Nevada Constitution states that the Legislature "shall provide by law" for the
14 use of medical marijuana by a patient for certain medical conditions and further provides that the
15 Legislature "shall provide by law" for a "registry of patients, and their attendants, who are authorized to
16 use [medical marijuana], to which law enforcement officers may resort to verify a claim of authorization
17 and which is otherwise confidential." Given that the registry is part of Article 4, Section 38, the Court
18 must assume that the voters approved this constitutional section because of the registry's inclusion
19 within this section. Therefore, the Court finds that there is no fundamental right to use medical

20 ¹⁰ *Accord Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (rejecting
21 contention that "the Ninth Amendment and the substantive due process component of the Fifth
22 Amendment together protect a fundamental right to 'distribute, possess and use medical cannabis' in
23 compliance with California state law."); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Cal.
24 2014) ("no court to date has held that citizens have a constitutionally fundamental right to use medical
marijuana."); *Beasley v. City of Keizer*, No. CIV. 09-6256-AA, 2011 WL 2008383, at *4 (D. Or. May
23, 2011) ("there is no record of any court decision establishing a federal right to marijuana based on
a state medical marijuana law; rather, courts have found no federal right to access or use marijuana in
the context of state medical marijuana laws."), *aff'd*, 525 F. App'x 549 (9th Cir. 2013).

1 marijuana without the registry because the voters expressly required the Legislature to provide by law
2 for the registry when they approved Article 4, Section 38.

3 To carry out its constitutional duty under Article 4, Section 38, the Legislature enacted the
4 registration program in NRS Chapter 453A with the stated intent to establish the registry and regulate
5 the use of medical marijuana to protect the health, safety and welfare of the public. A.B. 453, 2001 Nev.
6 Stat., ch. 592, preamble, at 3053; *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg.
7 (Nev. Apr. 10, 2001); *Hearing on A.B. 453 before Sen. Comm. on Human Res. & Facilities*, 71st Leg.
8 (Nev. May 30, 2001). In particular, the Legislature enacted NRS 453A.210 which directs the Division
9 to establish and maintain the registration program for the issuance of registration cards to applicants who
10 meet the requirements to use medical marijuana. Because the Court finds that there is no fundamental
11 right to use medical marijuana, the Court must uphold the Legislature's statutory scheme against
12 Plaintiff's Fourteenth Amendment challenge if the statutory scheme is rationally related to a legitimate
13 state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Vacco v. Quill*, 521 U.S. 793,
14 799 (1997).

15 In applying the rational-basis standard, the Court must remain mindful that "[s]tate legislation
16 which has some effect on individual liberty or privacy may not be held unconstitutional simply because
17 a court finds it unnecessary, in whole or in part." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). Instead,
18 "individual States have broad latitude in experimenting with possible solutions to problems of vital local
19 concern." *Id.* at 597-98. For example, in *Whalen*, the United States Supreme Court upheld a New York
20 statute which provided that whenever a "Schedule II" drug was prescribed to a patient, the patient's
21 name, address and age, along with the identity of the prescribed drug and its dosage, had to be filed with
22 the state department of health. *Id.* Applying the rational-basis standard, the Supreme Court upheld the
23 patient-identification statute because it was rationally related to the legitimate state interest of protecting
24 the health, safety and welfare of the public with regard to the distribution and abuse of dangerous drugs

1 for which there is both a lawful and an unlawful market. *Id.* As explained by the Supreme Court:

2 The New York statute challenged in this case represents a considered attempt to deal with
3 such a problem [of vital local concern]. It is manifestly the product of an orderly and
4 rational legislative decision. It was recommended by a specially appointed commission
5 which held extensive hearings on the proposed legislation, and drew on experience with
6 similar programs in other States. There surely was nothing unreasonable in the assumption
7 that the patient-identification requirement might aid in the enforcement of laws designed to
8 minimize the misuse of dangerous drugs. For the requirement could reasonably be expected
9 to have a deterrent effect on potential violators as well as to aid in the detection or
investigation of specific instances of apparent abuse. At the very least, it would seem clear
that the State's vital interest in controlling the distribution of dangerous drugs would support
a decision to experiment with new techniques for control. . . . It follows that the legislature's
enactment of the patient-identification requirement was a reasonable exercise of New York's
broad police powers. The District Court's finding that the necessity for the requirement had
not been proved is not, therefore, a sufficient reason for holding the statutory requirement
unconstitutional.

10 *Id.* (footnotes omitted).

11 In this case, the Court finds that the registration program in NRS Chapter 453A is rationally
12 related to the legitimate state interest of protecting the health, safety and welfare of the public because
13 the registration program serves a legitimate public protection function with regard to the distribution and
14 abuse of medical marijuana, which is a widely desired and dangerous drug for which there is both a
15 lawful and an unlawful market. As approved by the voters, Article 4, Section 38 requires the Legislature
16 to establish the registry to allow "law enforcement officers . . . to verify a [patient's] claim of
17 authorization" to use medical marijuana. Like the patient-identification system upheld in *Whalen*, the
18 registry is rationally related to a legitimate public protection function because the Legislature could
19 reasonably believe that the registry would aid in the enforcement of Nevada's medical marijuana laws,
20 have a deterrent effect on potential violators and assist in the detection or investigation of specific
21 instances of apparent abuse. For example, the registration program attempts to protect the public against
22 the illegal distribution and abuse of medical marijuana because NRS 453A.210(5) states in pertinent part
23 that the Division may deny an application if "[t]he Division determines that the applicant, or the
24 applicant's designated primary caregiver, if applicable, has been convicted of knowingly or intentionally

1 selling a controlled substance.”

2 Therefore, because the Court finds that there is no fundamental right to use medical marijuana and
3 because the Court finds that the registration program in NRS Chapter 453A is rationally related to the
4 legitimate state interest of protecting the health, safety and welfare of the public, the Court must uphold
5 the Legislature’s statutory scheme against Plaintiff’s Fourteenth Amendment challenge. Accordingly,
6 the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff’s federal
7 constitutional claims that the registration program in NRS Chapter 453A violates the Due Process and
8 Equal Protection Clauses of the Fourteenth Amendment.

9 **F. Fifth Amendment claim.**

10 In his fifth claim for relief, Plaintiff alleges that the persons who register with the State under the
11 medical marijuana laws are compelled by state law to admit that they intend to use medical marijuana
12 and that by making such an admission, they are compelled to incriminate themselves in violation the
13 privilege against self-incrimination in the Fifth Amendment because they are admitting that they are
14 engaging in acts illegal under federal law. (Compl. ¶¶ 104-110.)

15 The Court has examined the Division’s application packet, and the Court cannot find any violation
16 of the Fifth Amendment privilege against self-incrimination. The Court finds that the Division’s
17 application packet does not require any incriminating admissions by applicants, and the Court finds that
18 applicants are not compelled to give any incriminating information. Therefore, the Court concludes that
19 there is no violation of the Fifth Amendment privilege against self-incrimination.

20 The Fifth Amendment privilege against self-incrimination provides that no person “shall be
21 compelled in any criminal case to be a witness against himself.” As a general rule, the Fifth
22 Amendment privilege “not only protects the individual against being involuntarily called as a witness
23 against himself in a criminal prosecution but also privileges him not to answer official questions put to
24 him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate

1 him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). However, the United
2 States Supreme Court has held that the Fifth Amendment privilege does not apply unless the individuals
3 are, in some way, “compelled” to make incriminating statements. *Selective Serv. Sys. v. Minn. Pub.*
4 *Interest Research Grp.*, 468 U.S. 841, 856-58 (1984). In *Selective Serv. Sys.*, the Supreme Court held
5 that individuals are not “compelled” to make disclosures in violation of the Fifth Amendment privilege
6 when those disclosures are required as part of a *voluntary* application for benefits which the individuals
7 must file only if they want to be considered for the benefits. *Id.* In that case, the Supreme Court
8 determined that the Fifth Amendment privilege did not apply when individuals submitted applications
9 for federal educational aid and were required to disclose on their applications whether they registered for
10 the draft as required by federal law. *Id.* The Supreme Court stated that the application’s requirement
11 that an individual disclose whether he failed to register for the draft—a federal criminal offense—did
12 not violate the privilege against self-incrimination because an individual “clearly is under no compulsion
13 to seek financial aid.” *Id.* at 857.

14 Based on *Selective Serv. Sys.*, federal appellate courts have held that the Fifth Amendment
15 privilege does not apply when the government asks individuals to disclose potentially incriminating
16 information, such as information about past drug use, on questionnaires which the individuals file
17 because they want to be considered for participation in government programs. *Nat’l Fed’n of Fed.*
18 *Employees v. Greenberg*, 983 F.2d 286, 287, 291-93 (D.C. Cir. 1993); *Am. Fed’n of Gov’t Employees v.*
19 *Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 790, 794-95 (D.C. Cir. 1997). Furthermore, at least one
20 federal district court has concluded that the Fifth Amendment privilege is not implicated when
21 individuals apply to participate in the District of Columbia’s medical marijuana program as cultivators
22 or dispensary operators and are required to execute affidavits acknowledging that “[g]rowing,
23 distributing, and possessing marijuana in any capacity . . . is a violation of federal laws” and that the
24 “law authorizing the District’s medical marijuana program will not excuse any registrant from any

1 violation of the federal laws governing marijuana.” *Sibley v. Obama*, 810 F. Supp. 2d 309, 310-11
2 (D.D.C. 2011). As explained by the court:

3 plaintiff here is clearly “under no compulsion to seek” a permit to grow and sell medical
4 marijuana. Although plaintiff relies extensively on *Leary v. United States*, 395 U.S. 6, 16
5 (1969), that case addresses a situation, unlike here, where the defendant was actually
6 compelled—he faced criminal charges for failure “to identify himself” as a drug purchaser
under the relevant tax statute. Nothing in the District’s medical marijuana laws requires
plaintiff to apply to be a cultivator or to run a dispensary. Simply put, plaintiff need not
seek to participate in the District’s budding medical marijuana industry.

7 *Id.* at 311.

8 The Court finds that Nevada’s medical marijuana registration program is a voluntary program and
9 that nothing in Nevada’s medical marijuana laws requires any person to request, complete or submit an
10 application packet or register with the State, unless the person voluntarily elects to do so. Because
11 Nevada’s registration program is a voluntary program, the Court finds that the Fifth Amendment
12 privilege simply does not apply to the registration program because a person is not “compelled” by the
13 State to participate in the registration program. Furthermore, the Court finds that even if a person makes
14 the voluntary choice to participate in the registration program and completes the Division’s application
15 packet, the application packet does not require the person to make any incriminating admissions about
16 past acts which “might tend to show that he himself had committed a crime.” *Lefkowitz v. Turley*, 414
17 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Therefore, the Court
18 concludes that Defendants are entitled to judgment as a matter of law on Plaintiff’s federal constitutional
19 claim that the registration program in NRS Chapter 453A violates the Fifth Amendment privilege
20 against self-incrimination.

21 **G. State-law tort claims.**

22 In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud
23 alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration
24 cards which were useless in facilitating access to medical marijuana because the Department knew or

1 should have known that no dispensaries would be open in Southern Nevada within the one-year period
2 covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a
3 state-law tort claim against the Department for unjust enrichment alleging that he never obtained any
4 benefit from the registration cards because the Department never licensed any dispensaries during the
5 period that the registration cards were valid and that the Department unjustly accepted and retained his
6 fees for the registration cards. (Compl. ¶¶ 58-62.)

7 In response, the Department contends that Plaintiff's state-law tort claims for money damages are
8 barred as a matter of law by the following affirmative defenses: (1) the voluntary payment doctrine;
9 (2) the statute of limitations in NRS 11.190(5)(b); and (3) the State's sovereign immunity under
10 NRS 41.032(1). (Dept.'s Mot. to Dismiss at 9-11.) The Department also contends that Plaintiff's state-
11 law tort claims for money damages fail to state claims upon which relief can be granted because
12 Plaintiff's allegations are not legally sufficient to establish the essential elements of fraud or unjust
13 enrichment. (Dept.'s Mot. to Dismiss at 8-9.)

14 The Court finds that Plaintiff's state-law tort claims for money damages are barred as a matter of
15 law by the affirmative defense of the State's sovereign immunity under NRS 41.032(1) and *Hagblom v.*
16 *State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977). Therefore, the Court does not need to address the
17 other defenses and objections raised in the Department's motion to dismiss.

18 The State and its agencies and officials acting in their official capacities cannot be sued in state
19 court for state-law tort claims for money damages unless the lawsuit and the type of relief being sought
20 are both authorized by Nevada law. *See Arnesano v. State*, 113 Nev. 815, 820-24 (1997). Therefore, as
21 a general rule, a plaintiff cannot bring a state-law tort claim for money damages against the State and its
22 agencies and officials acting in their official capacities except as expressly authorized by the State's
23 conditional waiver of its sovereign immunity in NRS 41.031 et seq. *Hagblom*, 93 Nev. at 601-04. The
24 Legislature has expressly limited the State's conditional waiver of its sovereign immunity in

1 NRS 41.032(1), which provides in relevant part:

2 [N]o action may be brought under NRS 41.031 or against an immune contractor or an
3 officer or employee of the State or any of its agencies or political subdivisions which is:

4 1. Based upon an act or omission of an officer, employee or immune contractor,
5 exercising due care, in the execution of a statute or regulation, whether or not such statute or
6 regulation is valid, if the statute or regulation has not been declared invalid by a court of
7 competent jurisdiction[.]

8 Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are
9 absolutely immune from liability for state-law tort claims for money damages based on any acts or
10 omissions in their execution and administration of statutory provisions which have not been declared
11 invalid by a court of competent jurisdiction. *Hagblom*, 93 Nev. at 603-04. In *Hagblom*, the plaintiff
12 brought claims for declaratory relief regarding the validity of a state agency's regulation and also claims
13 for money damages based on the state agency's implementation of the regulation. The Nevada Supreme
14 Court upheld dismissal of the claims for money damages based on NRS 41.032(1), which the court
15 stated "provides immunity to all individuals implementing the new regulation since that policy, applied
16 with due care and without discrimination, had not been declared invalid by a court of competent
17 jurisdiction." *Id.* at 603.

18 In this case, the Court finds that Plaintiff's state-law tort claims for money damages against the
19 Department are the exact types of claims that the State's sovereign immunity under NRS 41.032(1) is
20 intended to prohibit because Plaintiff's claims are premised on alleged acts or omissions by a state
21 agency in the execution and administration of the State's medical marijuana laws which have not been
22 declared invalid by a court of competent jurisdiction. Therefore, because the Court finds that Plaintiff's
23 state-law tort claims for money damages are barred as a matter of law by sovereign immunity under
24 NRS 41.032(1) and *Hagblom*, the Court concludes that the Department is entitled to judgment as a
matter of law on Plaintiff's state-law tort claims for money damages for fraud and unjust enrichment.

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IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff's motion for partial summary judgment, motion for permanent injunction and counter-motion for summary judgment are DENIED.

2. Defendant State of Nevada ex rel. the Department's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; Defendant State of Nevada ex rel. the Governor's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; and Defendant State of Nevada ex rel. the Legislature's motion for summary judgment is GRANTED.

3. Having considered all causes of action and claims for relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and claims for relief, and the Court enters final judgment in favor of all Defendants.

4. Because the Court enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is not required to determine whether this action can be maintained as a class action under NRCP 23(c).

5. Pursuant to NRCP 58, Defendant Legislature is designated as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk of Court.

DATED: This 4 day of February, 2016.

ROB BARE
DISTRICT JUDGE

1 Respectfully submitted by:

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1 **IN THE SUPREME COURT**
2 **OF THE STATE OF NEVADA**

3 **JOHN DOE**, on his own behalf and
4 on behalf of a class of those similarly
5 situated,

6 *Appellant,*

7 v.

8 THE EIGHTH JUDICIAL DISTRICT
9 COURT OF THE STATE OF
10 NEVADA, IN AND FOR THE
11 COUNTY OF CLARK, AND THE
12 **HONORABLE ROB BARE**,

13 *Appellees,*

14 And

15 **STATE OF NEVADA** ex rel. THE
16 **LEGISLATURE OF THE 77th**
17 **SESSION OF THE STATE OF**
18 **NEVADA; STATE OF NEVADA**
19 **DEPARTMENT OF HEALTH AND**
20 **HUMAN SERVICES; THE**
 HONORABLE BRIAN
 SANDOVAL, in his official capacity
 as Governor of the State of Nevada,

Real Parties In Interest.

 Electronically Filed
 Mar 09 2016 10:26 a.m.
 Dist. Ct. Case No.: A-19-723643-0
 Tracie K. Lindeman
 Clerk of Supreme Court
 Case No.: 69801

MOTION FOR
 INJUNCTIVE
 RELIEF

PURSUANT TO
 NRAP 8

 COMES NOW, Appellant **JOHN DOE**, on his own behalf and on
 behalf of a class of those similarly situated., and hereby files this **MOTION**

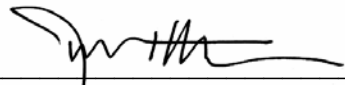
1 **FOR INJUNCTIVE RELIEF** seeking this Court to enjoin the on-going
2 operations of the Medical Marijuana Registry (“Registry”), such that a patient
3 no longer needs to file his or her physician’s recommendation to use medical
4 marijuana with the State of Nevada or any of its agencies and departments in
5 order to then have the rights and benefits of a person who would have
6 otherwise registered with the Registry.

7 This request is founded upon the legal argument presented to this Court
8 that the Registry violates our citizens’ 5th Amendment privilege against self-
9 incrimination by compelling disclosure of federally illegal activity through
10 the application process.

11 DATED THIS 22ND day of February, 2016.

12 **HAFTERLAW**

13
14 By:



JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Counsel for Appellant John Doe

1 **RULE 8 STATEMENT**

2 NRAP 8(2) requires that a motion for injunctive relief may be made in
3 this Court, provided that, pursuant to subsection (A), “the motion shall: (i)
4 show that moving first in the district court would be impracticable; or (ii)
5 state that, a motion having been made, the district court denied the motion or
6 failed to afford the relief requested and state any reasons given by the district
7 court for its action.”

8 This Motion seeks an injunction against the Registry. While a specific
9 new motion for such relief was not made to the district upon the filing of the
10 appeal, such would be nothing but a waste of judicial resources as the district
11 court already denied this relief. See Decision and Order, a true and correct
12 copy of which is attached hereto as **Exhibit “A”**.¹ The district court appears
13 to suggest that a person telling the State through the Registry application
14 process that he is going to grow and use medical marijuana – actions which
15 are illegal under federal law – is not a compelled disclosure because the
16 application does not appear to have specific or technical language expressly
17 admitting to a violation of federal law.

18
19

¹ In this case, the district court did not draft its own order. Rather,
20 competing drafts were filed by the parties and the Court adopted the order
submitted by the Appellees, which was basically a regurgitation of the legal
briefs it filed in this case.

1 **POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION FOR INJUNCTIVE RELIEF**

3
4 **I. INTRODUCTION**

5 In 2001, the people of the Great State of Nevada amended its
6 Constitution to all the “use by a patient, upon the advice of his physician, of
7 a plant of the genus Cannabis for the treatment or alleviation of” various
8 medical condition which, in the physician’s opinion would have some
9 medical benefit. Nev. Const. Art. 4, Sec. 38. In doing so, the Legislature
10 created a new section of the Nevada Revised Statutes to create a mechanism
11 for patients to be able to obtain and use medical marijuana without fear of
12 state criminal prosecution. See Nev. Rev. Stat. Chapter 453A. In doing so,
13 the State distinguished “medical marijuana” from street marijuana by
14 creating standards for testing, purity and labeling of marijuana. The State
15 also created a Registry through which all persons wishing to use medical
16 marijuana must be included. Nev. Const. Art. 4, Sec 38, (1)(d) (“ The
17 legislature shall provide by law for: ... A Registry of patients, and their
18 attendants, who are authorized to use the plant for a medical purpose, to
19 which law enforcement officers may resort to verify a claim of authorization
20 and which is otherwise confidential.”); NRS Chapter 453B.

1 This case, in part, challenges the constitutionality of this Registry.
2 Specifically, the fifth cause of action claims that the Registry is a violation
3 of 5th Amendment privilege against self-incrimination (as actionable under
4 42 U.S.C. §1983). See Second Amended Complaint. Specifically,
5 Appellant argues that by completing and submitting the application to be
6 included in the Registry,² the State of Nevada is compelling the applicant to
7 admit that they are growing and/or using medical marijuana – acts which are
8 illegal under federal law. Appellant argues that this compelled disclosure is
9 a violation of our citizens’ 5th Amendment privilege against self-
10 incrimination.

11 As any violation of one’s constitutional rights should be avoided at all
12 costs, Appellant asks this Court to enjoin the on-going operations of the
13 Registry, such that a patient no longer needs to file his or her physician’s
14 recommendation to use medical marijuana with the State of Nevada or any of
15 its agencies and departments in order to then have the rights and benefits of a
16 person who would have otherwise registered with the Registry.

17 ///

18 ///

20 ² A true and correct copy of the application is attached hereto as
 Exhibit “B”.

1 **II. BACKGROUND ON UNDERLYING CASE**

2 **First**, this case centers on an amendment to this State’s Constitution,
3 and how the amendment has been implemented. **Second**, the Constitutional
4 amendment provides, in part, for the “use by a **patient**, upon the advice of his
5 physician, of a **plant**.” Nev. Const. Art. 4, Sec 38, (1)(a). This is critical, in
6 that this constitutional amendment was the FIRST constitutional right that has
7 been created with respect to patients and patient care in Nevada! This
8 constitutional amendment provides a specific subclass of Nevadans –
9 PATIENTS seeking “treatment or alleviation of cancer, glaucoma, acquired
10 immunodeficiency syndrome; severe, persistent nausea of cachexia resulting
11 from these or other chronic or debilitating medical conditions; epilepsy and
12 other disorders characterized by seizure; multiple sclerosis and other disorders
13 characterized by muscular spasticity; or other conditions approved pursuant
14 to law for such treatment” – with a constitutionally protected right to obtain
15 access to a specific treatment – “a plant.” Id. Such granting of constitutional
16 rights cannot be dismissed, diminished or overlooked.

17 As a result of the constitutional amendment, the Legislature created a
18 new section of the Nevada Revised Statutes to establish a mechanism for
19 Nevada patients to be able to obtain and use medical marijuana without fear
20 of state criminal prosecution. See Nev. Rev. Stat. Chapter 453A. In doing so,

1 the State distinguished “**medical** marijuana” from street marijuana by creating
2 standards for testing, purity and labeling of marijuana.

3 Included within both the constitutional amendment and the NRS
4 chapter is a scheme for a Registry of patients. This Registry is operated by
5 the State of Nevada. In order to benefit from the statutory and constitutional
6 provisions for allowing the use of medical marijuana, a patient must apply to
7 be included in the Registry. As part of the registration process, a patient must
8 disclose his or her identity and admit to possessing and using, either currently,
9 or in the future, marijuana. The result is that there is a subset of Nevadans –
10 those who want to possess and use marijuana (an act that is illegal under
11 federal law) – who are required to admit their violation of federal law in order
12 to obtain a constitutionally protected right related to their access of medical
13 treatments. See Exhibit “B”.

14 ***If*** such compelled disclosure were related to the regulation of the
15 treatment of medical conditions, such ***may*** be permissible, as set forth by
16 Supreme Court case law, despite such conflicts with the Fifth Amendment.
17 However, in this case, the compelled disclosure is solely for purposes of law
18 enforcement. Such is evident by the recognition that there are no other patient
19 groups that are required to make such a compelled disclosure, nor are there
20 any other treatment regimens which require such a compelled disclosure. In

1 fact, even the wording of the Constitutional section makes it clear that the
2 Registry is for law enforcement purposes, by saying:

3 The legislature shall provide by law for ... A Registry
4 of patients, and their attendants, who are authorized
5 to use the plant for a medical purpose, to which law
6 enforcement officers may resort to verify a claim of
7 authorization and which is otherwise confidential.

8 Nev. Const. Art. 4, Sec 38, (1)(d). (*emphasis added*).

9 As such, the Registry is clearly a violation of the Fifth Amendment right
10 against self-incrimination. Whether the Registry violates the Fifth
11 Amendment privilege against self-incrimination does not depend on the
12 resolution of any factual allegations – it is a question of law.

13 As any violation of one’s constitutional rights should be avoided at all
14 costs, Appellant asks this Court to enjoin the on-going operations of the
15 Registry, such that a patient no longer needs to file his or her physician’s
16 recommendation to use medical marijuana with the State of Nevada or any of
17 its agencies and departments in order to then have the rights and benefits of a
18 person who would have otherwise registered with the Registry.

19 ///

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1 **III. STATEMENT OF FACTS**

2 1. In 2000, Nevada’s constitution was amended to add Article IV,
3 Section 38, entitled, “Use of plant of genus Cannabis for medical purposes.”

4 2. Article IV, Section 38 states:

5 1. The legislature shall provide by law for:

6 (a) The use by a patient, upon the advice of his
7 physician, of a plant of the genus Cannabis for the
8 treatment or alleviation of cancer, glaucoma,
9 acquired immunodeficiency syndrome; severe,
10 persistent nausea of cachexia resulting from these or
11 other chronic or debilitating medical conditions;
12 epilepsy and other disorders characterized by seizure;
13 multiple sclerosis and other disorders characterized
14 by muscular spasticity; or other conditions approved
15 pursuant to law for such treatment.

16 (b) Restriction of the medical use of the plant by
17 a minor to require diagnosis and written authorization
18 by a physician, parental consent, and parental control
19 of the acquisition and use of the plant.

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

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

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

1 2. This section does not:

2 (a) Authorize the use or possession of the plant
3 for a purpose other than medical or use for a medical
4 purpose in public.

5 (b) Require reimbursement by an insurer for
6 medical use of the plant or accommodation of
7 medical use in a place of employment.

8 [Added in 2000. Proposed by initiative petition and
9 approved and ratified by the people at the 1998 and
10 2000 general elections.]

11 3. Pursuant to this new constitutional section, the Nevada
12 Legislature added Chapter 453A to the Nevada Revised Statutes in 2001.

13 4. Both the Nevada Constitution and Chapter 453A of the Nevada
14 Revised Statutes require that a patient wishing to possess and use medical
15 marijuana register with the Defendants.

16 5. As part of the application process to be included in the Registry,
17 a patient must disclose their identity, address, and their plan for growing
18 marijuana. See Exhibit “B”.

19 6. In part, the application requires that the applicant disclose
20 information about the applicant’s “plans for growing marijuana.” In fact, the
 application form says that the “**PLANS FOR GROWING MARIJUANA**”
 section of the application is “**REQUIRED**”. (emphasis in the original). *Id.*

 7. Notwithstanding, the fact that one even registers with the

1 Registry is a disclosure that the person is involved with the use of marijuana
2 – a federally illegal act.
3

4 **IV. LEGAL STANDARD**

5 NRAP 8(a)(2) states “[a] motion for the relief mentioned in Rule
6 8(a)(1) may be made to the Supreme Court or to one of its justices.” The Rule
7 further states:

8 (A) The motion shall:

9 (i) show that moving first in the district
court would be impracticable; or

10 (ii) state that, a motion having been made,
the district court denied the motion or failed to
11 afford the relief requested and state any reasons
given by the district court for its action.

12 (B) The motion shall also include:

13 (i) the reasons for granting the relief
requested and the facts relied on;

14 (ii) originals or copies of affidavits or other
sworn statements supporting facts subject to
dispute; and

15 (iii) relevant parts of the record.

16 (C) The moving party must give reasonable notice
of the motion to all parties.

17
18 (D) A motion under this Rule shall be filed with the
clerk and normally will be considered by a panel of
the court. But in an exceptional case in which time
19 constraints make that procedure impracticable, the
motion may be considered by a single justice.
20

1 (E) The court may condition relief on a party's
2 filing a bond or other appropriate security in the
district court.

3 As to the motion for a stay or injunction, in determining whether to
4 grant such, this court considers the following factors: (1) whether the object
5 of the appeal will be defeated if the stay is not granted, (2) whether appellants
6 will suffer irreparable or serious injury if the stay is denied, (3) whether real
7 party in interest will suffer irreparable or serious injury if the stay is granted,
8 and (4) whether appellant is likely to prevail on the merits in an appeal. NRAP
9 8(c); see also Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 657 6 P.3d 982,
10 986 (2000).

11
12 **V. ARGUMENT**

13 **A. OBJECT OF APPEAL WILL BE DEFEATED IF STAY IS**
14 **NOT GRANTED**

15 The object of this appeal is to address various issues with the Registry,
16 with the Constitutionality of such being first and foremost.³ As discussed

17 _____
18 ³ It is recognized that a ruling on this Motion may resolve one of the
19 issues in this case; however, it will not be dispositive. There are several issues
20 in this case, including the district court's ruling that Appellant cannot obtain
any money damages from any the causes of action in this case, as well as the
Equal Protection argument – one in which the district court erred by denying
the existence of a fundamental right which was not argued by Appellant.
Appellant argued that there is a fundamental right to access the health care

recommended by one's physician; the district court, however, found that there is no fundamental right to use medical marijuana. This was a critical error.

The most familiar of the substantive rights (also referred to as "liberties") protected by the Fourteenth Amendment are those recognized by the Bill of Rights. The U.S. Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 147-148, 88 S.Ct. 1444 1446, 20 L.Ed.2d 491 (1968). During the last term, the Supreme Court stated that, in addition to the rights provided for within the Bill of Rights, the "liberties [protected by the Due Process Clause of the 14th Amendment] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 576 US __, 135 S. Ct. 2071, 191 L. Ed. 2d 953 (2015) (*citing*, *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); and *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965)). The Supreme Court has been extremely clear that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, *supra*.

"The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell*, *supra*. That responsibility, however, "has not been reduced to any formula." *Id.* (citing *Poe*, *supra*, 367 U. S. at 542 (Harlan, J., dissenting)). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. *See ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. *See Lawrence v. Texas*, 539 U. S. 558, 575 (2003). That method respects our history and learns from it without allowing the past alone to rule the present.

It is because of this that the courts have established rights not always recognized by the law, at the time. These include the **right to marry**, *Loving*, *supra*; the **right to marry someone of the same sex**, *Obergefell*, *supra*; the **right to have children**, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); the **right to direct the education and upbringing of one's children**, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510,

1 next, the loss of a constitutional right is an irreparable harm. While it would
2 be nice to wait until the merits of this case are resolved, such would jeopardize
3 the rights of those citizens of this State who are obligated to join the Registry
4 simply in order to undergo a medical treatment which has been recommended
5 by that person's private medical doctor. With every passing day, more and
6 more rights of the patients and citizens of this State are violated when they
7 apply for inclusion in the Registry, defeating the object of this appeal.

8
9 **B. THIS COURT MUST GRANT THE INJUNCTIVE**
10 **RELIEF BECAUSE ANY DELAYS IN ENFORCING OUR**
11 **CONSTITUTIONAL RIGHTS ARE IRREPARABLE**

12 The loss of a constitutional right constitutes irreparable harm for the
13

14 45 S.Ct. 571, 69 L.Ed. 1070 (1925); the **right to marital privacy**, Griswold,
15 *supra*; the **right to use contraception**, *ibid*; Eisenstadt, *supra*; the **right to**
16 **bodily integrity**, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.
17 183 (1952), the **right to abortion**, Casey *supra*; and the **right to refuse**
unwanted lifesaving medical treatment. Cruzan v. Director, MDH, 497 U.S.
261, 278-279, 110 S.Ct., at 2851-2852 (1990).

18 Many of these judicially enumerated rights have to do with health care.
19 To that end, this Court will be asked to declare that the right to access health
20 care recommended by a physician is a fundamental right. How can the right
to use contraception, the right to bodily integrity, the right to abortion and the
right to refuse unwanted lifesaving medical treatment all be fundamental
rights, but the right to access the health care recommended by one's physician,
not be such a right?

1 purpose of determining whether a preliminary injunction should be issued.
2 Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689-690 (1976). See,
3 also, Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011)
4 (on-going "exposure to [an unconstitutional] policy is both itself an ongoing
5 harm and evidence that there is 'sufficient likelihood' that Plaintiffs' rights will
6 be violated again" is a sufficient showing to grant a preliminary injunction.);
7 Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (unlawful detention);
8 LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985) (warrantless farm
9 inspections); see also, New York Times Co.v. United States, 403 U.S. 713, 91
10 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (the loss of First Amendment freedoms,
11 for even minimal periods of time).

12 This case alleges that the Registry violates our citizens' 5th Amendment
13 privilege against self-incrimination. If this Court believes that the Registry is
14 a violation of this constitution right, or, even that it may be a violation, this
15 Court must issue an injunction to preserve our 5th Amendment rights. In doing
16 so, Appellant asks this Court to enjoin the on-going operations of the Registry,
17 such that a patient no longer needs to file his or her physician's
18 recommendation to use medical marijuana with the State of Nevada or any of
19 its agencies and departments in order to then have the rights and benefits of a
20 person who would have otherwise registered with the Registry.

1 **C. THE REAL PARTY IN INTEREST WILL NOT SUFFER**
2 **IRREPARABLE OR SERIOUS INJURY IF THE STAY IS**
3 **GRANTED**

4 At oral argument on this issue before the district court, the Appellees
5 argued that the Registry is essential to promote public safety; however,
6 minimal support for this position was provided.

7 The Registry is nothing more than a gatekeeper. It does not monitor
8 consumption by a person on the Registry. Without measuring use by the
9 Registry participants, any argument that the Registry avoids or prevents
10 abuse is complete legal fiction.⁴

11 Rather, it creates a barrier to entry – a barrier which is intended, upon
12 admission of the Defendants at oral argument – to prevent those with felony
13 records from participating in the Registry. Clearly, we, as a state, do not
14 want criminals, excuse me, people with criminal backgrounds, buying

15 ⁴ For example, in tackling how this State would deal with the increasing
16 number of home based methamphetamine labs, the Legislature not only
17 created a Registry to monitor who was buying pseudoephedrine – a key
18 ingredient in meth –the Legislature also set a limit as to how much can be
19 bought at a given time. Currently, a person cannot purchase more than two
20 weeks' worth at any time (or any more during that two week period).
Hence, a user of this over the counter drug cannot go from store to store to
buy the controlled substance, nor can this person re-buy every day; rather,
once they bought two weeks' worth, they cannot buy again until two weeks
has passed.

1 medical marijuana in a controlled legalized environment upon
2 recommendation from their physician; Appellant understands how this
3 promotes public safety.⁵

4 The only other basis for the Registry is to facilitate *law enforcement*
5 confirmation of enrollment in the Registry if someone is found to be in
6 possession of marijuana. However, this argument is nonsensical, also, as it
7 is not law enforcement's job to be a trier of fact; rather, that is for the courts.
8 To that end, if law enforcement finds someone with marijuana, they should
9 treat it as finding someone with marijuana. It will then be the patient's burden
10 to demonstrate how, at the time of the search, the patient had a valid
11 recommendation from his or her physician. There is no benefit to the public
12 by allowing law enforcement to confirm who in this State has a medical
13 marijuana card. In fact, it only sets up a system for abuse through
14 unnecessary harassment by law enforcement.

15 _____
16 ⁵ For the record, Appellant is being facetious in making this argument to
17 highlight the absurdity of the Appellees' position. If someone is a criminal, it
18 is not likely that they would participate in this system (although having a
19 criminal move his marijuana acquisition from the black market to a regulated
20 market, would actually be a benefit to the people of this State). The fallacy
with this argument is that it does not take into account why the person has the
criminal conviction. For example, wouldn't Nevada want to welcome a
stable, educated professional who decides to move his entire business to
Nevada because he can now get legalized medical marijuana for his glaucoma,
as opposed to his current state, where such is illegal (which is why he had a
felony conviction).

1 The fact is that there is no legitimate basis for the Registry – at least
2 how it is currently designed. Hence, an injunction would not injure the Real
3 Parties in Interest.

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8 **D. APPELLANT WILL SUCCEED ON MERITS**

9 1. BACKGROUND ON 5TH AMENDMENT

10 As a question of law, this Motion asks this Court whether the
11 application to be included in the Registry, yet alone, inclusion in the Registry,
12 is a compelled disclosure that has an incriminating potential, and, therefore
13 violates the 5th Amendment privilege against self-incrimination. The U.S.
14 Supreme Court has stated that “[w]henver the Court is confronted with the
15 question of a compelled disclosure that has an incriminating potential, the
16 judicial scrutiny is invariably a close one. Tension between the State’s
17 demand for disclosures and the protection of the right against self-
18 incrimination is likely to give rise to serious questions. Inevitably these must
19 be resolved in terms of balancing the public need on the one hand, and the
20 individual claim to constitutional protections on the other; neither interest can

1 be treated lightly.” California v. Byers, 402 U.S. 424, 427, 91 S.Ct. 1535, 29
2 L.Ed.2d 9 (1971).

3 Plaintiff does recognize that certain limitation and burdens imposed on
4 the constituents of a society, including certain compelled disclosures, are
5 legal. As noted by the U.S. Supreme Court in Byers:

6 An organized society imposes many burdens on its
7 constituents. It commands the filing of tax returns for
8 income; it requires producers and distributors of
9 consumer goods to file informational reports on the
10 manufacturing process and the content of products,
11 on the wages, hours, and working conditions of
12 employees. Those who borrow money on the public
13 market or issue securities for sale to the public must
14 file various information reports; industries must
15 report periodically the volume and content of
16 pollutants discharged into our waters and atmosphere.
17 Comparable examples are legion.

18 In each of these situations there is some possibility of
19 prosecution—often a very real one—for criminal
20 offenses disclosed by or deriving from the
information that the law compels a person to supply.
Information revealed by these reports could well be a
link in the chain of evidence leading to prosecution
and conviction. But under our holdings the mere
possibility of incrimination is insufficient to defeat
the strong policies in favor of disclosure called for by
statutes like the one challenged here.

402 U.S. at 427-28.

Any compelled disclosure analysis must begin with the Fifth
Amendment. The Fifth Amendment protects a person from being “compelled

1 in any criminal case to be a witness against himself.” U.S. Const. amend. V.
2 This protection extends not only to criminal proceedings, but any proceeding
3 in which the answers *might* incriminate the individual in a *future* criminal
4 proceeding. Allen v. Illinois, 478 U.S. 364, 368, 106 S.Ct. 2988, 92 L.Ed.2d
5 296 (1986). “[T]he Fifth Amendment privilege may not be invoked to resist
6 compliance with a regulatory regime constructed to effect the State’s public
7 purposes unrelated to the enforcement of its criminal laws.” Balt. Dep’t of
8 Social Servs. v. Bouknight, 493 U.S. 549, 556, 110 S.Ct. 900, 107 L.Ed.2d
9 992 (1990). “It is a shield that prevents one from being convicted out of his
10 own mouth by anything short of voluntary statements.” Lewis v. United
11 States, 348 U.S. 419, 421, 75 S.Ct. 415, 99 L.Ed. 475 (1955).

12 Not all compelled disclosures will be deemed a violation of the 5th
13 Amendment, even when such disclosure incriminates a citizen. In 1927, the
14 Supreme Court held that an application of the 5th Amendment privilege was
15 not warranted with respect to tax filings. United States v. Sullivan, 274 U.S.
16 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). In that case, a bootlegger was
17 prosecuted for failure to file an income tax return. He claimed that the
18 privilege against compulsory self-incrimination afforded him a complete
19 defense because filing a return would have tended to incriminate him by
20 revealing the unlawful source of his income. Speaking for the Court, Mr.

1 Justice Holmes rejected this claim on the ground that it amounted to “an
2 extreme if not an extravagant application of the Fifth Amendment.” Id., at
3 263—264, 47 S.Ct., at 607.

4 In order to invoke the 5th Amendment privilege it is necessary to show
5 that the compelled disclosures will themselves confront the claimant with
6 “substantial hazards of self-incrimination.” The components of this
7 requirement were articulated in Albertson v. SACB, 382 U.S. 70, 86 S.Ct.
8 194, 15 L.Ed.2d 165 (1965), and later in Marchetti v. United States, 390 U.S.
9 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), Grosso v. United States, 390 U.S.
10 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), and Haynes v. United States, 390
11 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968). In Albertson the Court held
12 that an order requiring registration by individual members of a Communist
13 organization violated the privilege. There, the Court took the opportunity to
14 distinguish the permissive compelled disclosure in Sullivan with
15 circumstances when such compelled disclosures are not permitted. The Court
16 stated:

17 In Sullivan the questions in the income tax return
18 were neutral on their face and directed at the public at
19 large, but here they are directed at a highly selective
20 group inherently suspect of criminal activities. Petitioners’ claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the * * * questions

1 in context might involve the petitioners in the
2 admission of a crucial element of a crime.

3 382 U.S., at 79, 86 S.Ct., at 199 .

4 Albertson was followed by Marchetti and Grosso where the Court held
5 that the privilege afforded a complete defense to prosecutions for
6 noncompliance with federal gambling tax and registration requirements. In
7 Marchetti, the Court noted that “The constitutional [5th Amendment] privilege
8 [against self-incrimination] was intended to shield the guilty and imprudent
9 as well as the innocent and foresighted; if such an inference of antecedent
10 choice were alone enough to abrogate the privilege’s protection, it would be
11 excluded from the situations in which it has historically been guaranteed, and
12 withheld from those who most require it.” 390 U.S. at 51. It was also followed
13 in Haynes where petitioner had been prosecuted for failure to register a
14 firearm as required by federal statute. In each of these cases the Court found
15 that compliance with the statutory disclosure requirements would confront the
16 petitioner with “substantial hazards of self-incrimination.” E.g., Marchetti v.
17 United States, 390 U.S., at 61, 88 S.Ct., at 709.

18 In all of these cases the disclosures which were found to be violative of
19 the Fifth Amendment were those which were extracted from a “highly
20 selective group inherently suspect of criminal activities.” E.g., Albertson v.

1 SACB, 382 U.S., at 79, 86 S.Ct., at 199; Marchetti v. United States, 390 U.S.,
2 at 47, 88 S.Ct., at 702. The Court further noted that the application of the 5th
3 Amendment to prevent a compelled disclosure only applied in “an area
4 permeated with criminal statutes” — not in “an essentially noncriminal and
5 regulatory area of inquiry.” Id.

6 The term after the Court decided Marchetti, it decided the case of Leary
7 v. United States, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969). The
8 Supreme Court granted certiorari in Leary to address, in part, “whether
9 petitioner’s conviction for failing to comply with the transfer tax provisions
10 of the Marihuana Tax Act violated his Fifth Amendment privilege against
11 self-incrimination.” Id. The Supreme Court found that:

12 If read according to its terms, the Marihuana Tax Act
13 compelled petitioner to expose himself to a ‘real and
14 appreciable’ risk of self-incrimination, within the
15 meaning of our decisions in Marchetti, Grosso, and
16 Haynes. Sections 4741—4742 required him, in the
course of obtaining an order form, to identify himself
not only as a transferee of marihuana but as a
transferee who had not registered and paid the
occupational tax under §§ 4751—4753. \

17 Id. at 16. The Court further found that “[i]t follows that the class of possessors
18 who were both unregistered and obliged to obtain an order form constituted a
19 ‘selective group inherently suspect of criminal activities.’ Since compliance
20 with the transfer tax provisions would have required petitioner unmistakably

1 to identify himself as a member of this ‘selective’ and ‘suspect’ group, we can
2 only decide that when read according to their terms these provisions created a
3 ‘real and appreciable’ hazard of incrimination.” Id. at 18

4
5 2. THE REGISTRY VIOLATES THE 5TH AMENDMENT

6 Using the balancing analysis between public need for a compelled
7 disclosure, on the one hand, and the individual claim to constitutional
8 protections, on the other, (a test set forth by Supreme Court in Byers, supra,
9 402 U.S. at 430), this Court is asked to determine whether the Registry
10 violates a person’s Fifth Amendment privilege. To invoke the privilege
11 against self-incrimination, a claimant must show “that the compelled
12 disclosures will themselves confront the claimant with ‘substantial hazards of
13 self-incrimination.’” Id. at 429, 91 S.Ct. at 1538 (*quoting Sullivan, supra*, 274
14 U.S. at 259). A corollary to this principle is that “the Fifth Amendment
15 privilege may not be invoked to resist compliance with a regulatory regime
16 constructed to effect the State’s public purposes unrelated to the enforcement
17 of its criminal laws.” Baltimore City Dept. of Social Services v. Bouknight,
18 493 U.S. 549, 554, 110 S.Ct. 900, 905, 107 L.Ed.2d 992 (1990).

19 In determining whether a compelled disclosure threatens self-
20 incrimination, several factors are to be considered: (1) whether the disclosure

1 requirement targets a “highly selective group inherently suspect of criminal
2 activities,” rather than the public generally, Byers, 402 U.S. at 430, 91 S.Ct.
3 at 1539 (*citing* Albertson v. Subversive Activities Control Bd., 382 U.S. 70,
4 79, 86 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965)); (2) whether the requirement
5 involves “an area permeated with criminal statutes,” rather than “an
6 essentially noncriminal and regulatory area of inquiry,” Id. (*citing* Albertson,
7 382 U.S. at 79, 86 S.Ct. at 199); and (3) whether compliance would compel
8 disclosure of information that “would surely prove a significant ‘link in a
9 chain’ of evidence tending to establish [] guilt,” Marchetti, *supra*, 390 U.S.
10 at 48 (citation omitted), rather than disclosing “no inherently illegal activity.”
11 Bouknight, 493 U.S. at 557, 110 S.Ct. at 906 (internal quotations and citations
12 omitted).

13 a) *Highly Selective Group Inherently Suspect of*
14 *Criminal Activities*

15 Congress passed the Comprehensive Drug Abuse Prevention and
16 Control Act of 1970, Pub.L. No. 91-513, 84 Stat. 1236, to create a
17 comprehensive drug enforcement regime it called the Controlled Substances
18 Act, 21 U.S.C. § 801-971. Congress established five “schedules” of
19 “controlled substances.” See 21 U.S.C. § 802(6). Controlled substances are
20 placed on a particular schedule based on their potential for abuse, their

1 accepted medical use in treatment, and the physical and psychological
2 consequences of abuse of the substance. See 21 U.S.C. § 812(b). Marijuana is
3 a Schedule I controlled substance. 21 U.S.C. § 812(c), Sched. I(c)(10). For a
4 substance to be designated a Schedule I controlled substance, it must be found:
5 (1) that the substance “has a high potential for abuse”; (2) that the substance
6 “has no currently accepted medical use in treatment in the United States”; and
7 (3) that “[t]here is a lack of accepted safety for use of the drug or other
8 substance under medical supervision.” 21 U.S.C. § 812(b)(1). The Controlled
9 Substances Act sets forth procedures by which the schedules may be
10 modified. See 21 U.S.C. § 811(a). Under the Controlled Substances Act, it is
11 unlawful to knowingly or intentionally “manufacture, distribute, or dispense,
12 or possess with intent to manufacture, distribute, or dispense, a controlled
13 substance,” except as otherwise provided in the statute. 21 U.S.C. § 841(a)(1).
14 Possession of a controlled substance, except as authorized under the
15 Controlled Substances Act, is also unlawful. See 21 U.S.C. § 844(a).
16 Accordingly, regardless of any state laws that may have been passed, the
17 possession of marijuana is illegal under federal law.

18 This Court does not need to engage in any new legal analysis to resolve
19 this prong of the test; the U.S. Supreme Court already did so for us in Leary,
20 *supra*. The Supreme Court found, with respect to the tax provisions of the

1 Marihuana Tax Act, because the Act only dealt with those who possess
2 marijuana – a federally illegal activity - “the class of possessors who were
3 both unregistered and obliged to obtain an order form⁶ constituted a ‘selective
4 group inherently suspect of criminal activities.’” Id., 395 U.S. at 18.

5 Notwithstanding, however, the Registry only targets people who are
6 engaging in a federal crime – users and growers of marijuana. The Registry,
7 a creature of statute, requires that medical marijuana users in Nevada fill out
8 and return various forms and related documentation which discloses to the
9 government the identity of a person who intends to possess and use marijuana.
10 **Only** users of medical marijuana (or their caretakers) – both of whom are
11 engaging in an act that is illegal under federal law – are obligated to apply for
12 inclusion in the Registry. Hence, the Registry only applies to a “selective
13 group inherently suspect of criminal activities” and deals with an area
14 permeated with criminal statutes.” There is no argument that can be made by
15 the Defendants that the Registry targets the public generally, Byers, 402 U.S.
16 at 430, 91 S.Ct. at 1539, as opposed to only those who are growing, possessing
17 and using marijuana – an illegal act under federal law.

18
19 ⁶ In Leary, the scrutiny was placed on compliance with certain tax
20 requirements for those who possessed marijuana. Under these requirements,
in order to comply with the tax requirements, one had to order a form from
the government. A fee was charged for ordering the form. This is no
different than what a Nevada patient must do under Nevada law.

1 In fact, looking at the application to be included in the Registry, it is
2 clear that the application process is targeted directly towards people engaging
3 in criminal activities. See **Exhibit “B”**. The last page of the application
4 includes the following acknowledgment:

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ACKNOWLEDGEMENT

PLEASE READ AND INITIAL THE FOLLOWING STATEMENTS:

| | |
|--|---------|
| 1. The federal government does not recognize the medical marijuana card and does not exempt the holder from prosecution under federal law. | _____ |
| | Initial |
| 2. The medical marijuana card is issued for use in Nevada, and may not be recognized by other states. | _____ |
| | Initial |
| 3. "The state must not be held responsible for any deleterious outcomes from the medical use of marijuana by any person." NRS 453A.810. | _____ |
| | Initial |

I, _____, acknowledge that I have read and understood the statements above.

Dated this _____ day of _____, 20____

Signature of Person Acknowledging Statement

State of Nevada
Notary Public in and for said County of _____

This instrument was acknowledged by _____ on this _____ day of _____, 20____

(Notary Seal)

Signature of Notary

Exhibit "B" at 10.

The reality is that the precise language of the application is irrelevant. The fact that the State of Nevada requires a person to acknowledge, under notary verification, that the federal government does not recognize the medical marijuana card and does not exempt a holder from prosecution under federal law is the State's recognition that the class of people subject to the Registry is a highly selective class of people who are engaging in criminal

1 activities.

2 Accordingly, this prong of the test has been met.

3
4 *b) “An Area Permeated With Criminal Statutes”*
5 *Rather Than “An Essentially Noncriminal And*
Regulatory Area Of Inquiry”

6 The Registry requires that a patient who intends to follow their
7 physician’s recommendation for treatment of their medical condition must (a)
8 identify themselves to the state, and (b) admit that the applicant intends to
9 expressly violate federal law; these disclosures are then available to law
10 enforcement officers. Under the very language of the Nevada Constitution
11 the Registry is intended to be made available to “law enforcement officers”
12 for purposes of their verification that a person has been “authorized to use”
13 medical marijuana pursuant to NRS Chapter 453A. Nev. Const. Art. IV, Sec.
14 38(1)(d). The term “law enforcement officers” is not limited to state actors
15 under the Nevada Constitution.⁷

16 As discussed above, there is no other legitimate purpose for the
17 Registry, but for purposes related to an area permeated with criminal statutes.

18
19 ⁷ For purposes of candor to the Court, this term is defined in the state
20 statute, NRS §453A.410 (referring to the definition set forth in NRS
239C.030); however, such creations of the Legislature cannot be applied to
limit language in the Nevada Constitution.

1 The government may claim that the Registry *protects* the patients who use
2 medical marijuana from criminal prosecution. Whether the purpose is to
3 protect from prosecution, or engage in prosecution is an unnecessary
4 distinction. The fact is that there is NO purpose for the Registry BEYOND
5 law enforcement activities. There is no Registry for Nevada patients who use
6 narcotics for pain relief. There is no Registry for Nevada patients who use
7 benzodiazepines for seizure control. There is no Registry for Nevada patients
8 who use ANY OTHER TREATMENT BESIDES MARIJUANA for “the
9 treatment or alleviation of cancer, glaucoma, acquired immunodeficiency
10 syndrome; severe, persistent nausea of cachexia resulting from these or other
11 chronic or debilitating medical conditions; epilepsy and other disorders
12 characterized by seizure; multiple sclerosis and other disorders characterized
13 by muscular spasticity.”⁸

14 The test for this Court is whether the requirement of the compelled
15 disclosure, specifically, a patient’s application for inclusion in the Registry,
16 involves “an area permeated with criminal statutes,” rather than “an
17 essentially noncriminal and regulatory area of inquiry.” Byers, 402 U.S. at
18 430. As the Registry is intended solely to address law enforcement and
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20 ⁸ These are the permissive uses for medical marijuana as set forth in
Article VI, Section 38 of the Nevada Constitution.

1 prosecution issues, this component of the test for the application of the Fifth
2 Amendment privilege is met.

3
4 *c) Compliance Would Compel Disclosure of*
5 *Information that “Would Surely Prove a*
6 *Significant ‘Link in a Chain’ of Evidence Tending*
7 *to Establish [] Guilt”*

8 Finally, this Court must determine whether compliance with the
9 Registry would compel disclosure of information that “would surely prove a
10 significant ‘link in a chain’ of evidence tending to establish [] guilt” – where,
11 guilt, in this case would be a violation of federal law.⁹ Without the Registry,
12 the government would have no knowledge of any patient who uses medical
13 marijuana, save and except for those patients who actually get caught with
14 marijuana in their possession; with the Registry, the government has
15 knowledge as to the identity of every patient who intends to use medical
16 marijuana under the laws of the State of Nevada. As a patient only enters the
17 Registry through self-disclosure, the application to be included in the Registry

17 ⁹ It is noted for this Court that the evidence must only be a link – not
18 comprehensive evidence. The link in this case is the identity of a person
19 who admits to violating federal law through their possession and use of
20 marijuana for medical purposes. From this admission, the law enforcement
agent has sufficient probable cause to obtain a warrant from a federal judge
for a person’s home, and engage in a search of the home. Based on the fact
that the person has already admitted to possession and use of medical
marijuana, the likelihood of a seizure of contraband is substantial.

1 is a direct admission that the person is, or is planning on violating federal law
2 as a result of their medical use of marijuana. This admission would clearly
3 be a “significant link in a chain of evidence”.

4 Again, notwithstanding, this Court does not need to engage in any new
5 legal analysis to resolve this prong of the test, either. Under Leary, the
6 Supreme Court stated that, “[s]ince compliance with the transfer tax
7 provisions would have required petitioner unmistakably to identify himself as
8 a member of this ‘selective’ and ‘suspect’ group, we can only decide that when
9 read according to their terms these provisions created a ‘real and appreciable’
10 hazard of incrimination.” Leary, 395 U.S. at 18. As such, this prong has been
11 met, as well.

12 Notwithstanding, redirecting the Court’s attention to page 10 of
13 **Exhibit “B”**, the fact that the State of Nevada requires a person to
14 acknowledge, under notary verification, that the “state must not be held
15 responsible for any deleterious outcomes from the medical use of marijuana”
16 is the State’s recognition of the potential of prosecution which the Registry
17 holder is subject to by engaging in this behavior – a behavior that is admitted
18 to and proven through the disclosures made within a person’s application to
19 obtain a medical marijuana card and be included in the Registry.

20 Accordingly, the test has been satisfied that the compelled disclosures

1 required to obtain a medical marijuana card and be included in the Registry
2 are a violation of the Plaintiff's (and others situated like him) Fifth
3 Amendment privilege.

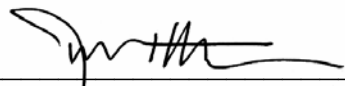
4
5 **VI. CONCLUSION**

6 For the foregoing reasons, Appellant asks this Court to enjoin the on-
7 going operations of the Medical Marijuana Registry, such that a patient no
8 longer needs to file his or her physician's recommendation to use medical
9 marijuana with the State of Nevada or any of its agencies and departments in
10 order to then have the rights and benefits of a person who would have
11 otherwise registered with the Registry.

12 DATED THIS 22ND day of February, 2016.

13 **HAFTERLAW**

14
15 By:



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☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☒ Electronic Service – By filing such with the Court’s electronic court filing system and requesting service there through;

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

Honorable Rob Bare
Eighth Judicial District Court

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